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9462

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY (a corporation), *Appellant.* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), GENERAL AMERICAN TRANSPORTATION (a corporation), *Appellees.*	No. 11,538
EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), *Appellee.*	No. 11,539

APPELLANT'S OPENING BRIEF.

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Subject Index

I. Page

Pleadings, proceedings and jurisdiction 2

The jurisdiction of the Circuit Court of Appeals and of the District Court 2

II.

Statement of the case and the questions involved 3

III.

Specifications of error 7

IV.

Argument 8

A. The District Court erred in entering a summary judgment for the defendant without a trial 8

B. A judgment of a District Court unsupported by findings of fact and conclusions of law requires reversal .. 13

V.

Conclusion 14

Table of Authorities Cited

Cases	Pages
Avrick v. Rockmont Envelope Co., 155 F. (2d) 568	9
Doehler Metal Furniture Co. v. U. S., 149 F. (2d) 130	9
El Dorado Terminal Co. v. U. S., 328 U. S. 12	5
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422	11, 12
Interstate Commeree Commission v. Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83	11
Krug v. Santa Fe Pac. RR. Co., 158 F. (2d) 317	9
Mayo v. Lakeland Highlands, etc., 309 U. S. 310, 84 L. Ed. 774	13
Perry v. Baumann (C.C.A. 9th), 122 F. (2d) 409	13
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 88 L. Ed. 967	9
Timetrust v. Securities and Exchange Comm. (C.C.A. 9th), 130 F. (2d) 214	13
Union Pacific Railroad v. United States, 313 U. S. 450, 85 L. Ed. 1453	12
United States v. Baltimore & Ohio R.R. Co., 231 U. S. 274, 58 L. Ed. 218	11
United States v. Hartford Empire Co., 1 Fed Rules Decisions 424	9, 10
Wyant v. Crittenden, 113 F. (2d) 170	9

Statutes

Pages

Act of April 26, 1928, C. 440, 45 Stat. at L. 466 2

Interstate Commerce Act, Section 15 (13) 5

Judicial Code, Section 128, subdivision (a) 2

28 U.S.C., Sections 861 (a), 861 (b), Id. Section 225, subdivision (a) 2

Rules

Rules of Civil Procedure for the District Courts of the United States:

Rule 16 10
Rule 56 ..... 9, 10
Rule 73 2
Rule 74 2
Rule 75 2

IN THE

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EL DORADO TERMINAL COMPANY (a corporation), *Appellant.* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), *Appellee.*	No. 11,539

APPELLANT'S OPENING BRIEF.

Appellant has appealed from the judgments of dismissal in two cases entered on orders for summary judgments after a pretrial conference. Both actions were based on the same contract. In one of the actions, appellant sought to recover on the contract liability sums collected by appellee for appellant's account between July 1, 1934 and May 31, 1935, and in the other recovery is sought for sums likewise collected

and retained by appellee from May 31, 1934 to January 1, 1937. The issues were the same in both cases. By stipulation the appeals were consolidated for hearing in this Court.

I.

PLEADINGS, PROCEEDINGS AND JURISDICTION.

The jurisdiction of the Circuit Court of Appeals and of the District Court.

The actions were in assumpsit between citizens of different states. Each involved an amount in excess of $3,000.00. In one of these actions (No. 11,539) the Supreme Court of the United States held that the District Court had jurisdiction of the subject matter and the parties. The pleadings were the same in the second action.

The Circuit Court of Appeals for the Ninth Circuit has jurisdiction of these appeals under the Act of April 26, 1928, C. 440, 45 Stat. at L. 466; Judicial Code, Sec. 128, subdv. (a) First; 28 U.S.C. Sec. 861 (a), 861 (b), Id. Sec. 225, subdv. (a) First; Secs. 73, 74 and 75 of the Rules of Civil Procedure for the District Courts of the United States.

The jurisdiction of this Court was also affirmed by the order of June 5, 1947, denying motions to dismiss the appeals.

II.

STATEMENT OF THE CASE AND THE QUESTIONS INVOLVED.

Abstract of statement of the cases:

On September 28, 1933, the El Dorado Oil Works, a California corporation, engaged in the manufacture of cocoanut oil in the San Francisco Bay area, entered into a written contract with the General American Tank Car Corporation, a West Virginia corporation owning and leasing tank cars, but not engaged in transportation, under which the Oil Works leased for a period of two years commencing January 1, 1934, at an agreed monthly rental, fifty (50) tank cars of specified type and size and such additional cars as the Oil Works business required. The cars were to be used by the Oil Works in the transportation of its oil within the United States. The Oil Works also agreed to report to the Tank Car Corporation the movements of each car and pay as additional rental the amount chargeable by the carriers where the empty haul exceeded the loaded haul movement. The Tank Car Corporation agreed to collect from the several railroad carriers over whose lines the cars moved the mileage allowance of 1½¢ per mile loaded and empty provided to be paid in the published tariffs and to credit and pay the mileage so collected to the Oil Works. The Oil Works operated the tank cars, paid the rentals and performed its obligations under the contract (R. 5). The Tank Car Corporation paid to the Oil Works the mileage so collected and performed its obligations under the contract for the first six months, ending June 30, 1934, of the contract

period. It thereafter refused to pay any portion of the mileage so collected in excess of the monthly car rentals paid or payable by the Oil Works. It nevertheless continued to collect the full mileage allowance fixed by the tariffs and retained the excess over the car rentals paid.

After refusal by appellee to make payment according to the contract of the sums so collected and retained, the Oil Works assigned its right under the contract and its causes of action to appellant, a wholly owned subsidiary. Appellant thereupon filed suit against the appellee to recover the sums so accrued between July 1, 1934, and May 31, 1945. Appellee in answering the complaint admitted the making of the contract, without question as to its validity, likewise, admitted that it had collected the mileage allowance for the period named in the complaint and retained the excess to the amount of $18,532.78. In explanation of its refusal to pay to the Oil Works the sums accrued under the terms of the contract, appellee pleaded as a special defense that the payment of the amount so received and retained by it in excess of the car rentals paid by the Oil Works would constitute a rebate, concession or discrimination prohibited by the provisions of the Elkins Act (R. 18). The District Court rendered judgment for defendant without opinion. Upon appeal said judgment was reversed by this Court (104 F., (2d) 903). Upon application by appellee, joined by the Interstate Commerce Commission, the Supreme Court granted certiorari and thereafter reversed and remanded the cause to the District Court for further proceedings (R. 34). In conso-

nance with the opinion of the Supreme Court, appellant made application to the Interstate Commerce Commission for an investigation under the provisions of Section 15 (13) of the Interstate Commerce Act. A limited investigation was made and on April 10, 1944, the Commission released a decision and order (Allowance for Privately Owned Tank Cars, No. 28,515 in the files of the Commission). Appellant thereupon instituted an action in the District Court of the United States for the Northern District of California before a Three Judge Court under the provisions of the Urgent Deficiencies Act to set aside and annul the order of the Commission. After a hearing the Three Judge District Court held that it had no jurisdiction, refused to hear the case upon the merits and ordered a dismissal. Upon direct appeal to the Supreme Court of the United States that Court held that the Three Judge District Court had jurisdiction, but proceeded to determine the case upon the merits and held (*El Dorado Terminal Co. v. U. S.,* 328 U.S. 12), that the Interstate Commerce Commission had determined the questions submitted to it by the previous decision of the Court and affirmed the decision of the Three Judge District Court dismissing the action. The proceedings above mentioned were all taken in or pertained to the first cause instituted by the appellant (No. 11,539 in this Court). In the meantime the second action (No. 11,538) was begun by appellant to recover $38,149.19 collected by appellee for appellant's account between the 31st day of May, 1935, and the 31st day of January, 1937, and retained in breach of the agreement of September 28, 1933.

In its answer to the complaint in this action appellee admitted the collection and retention of the amount sued for and pleaded the same special defense as in the former action. None of the proceedings above mentioned following the judgment in the first case pertained to the second action (No. 11,538), and no proceedings were had in respect of that action after the filing of appellee's answer. On July 20, 1946 (R. 37) both cases were called for pretrial hearing in the District Court. On September 16, 1946, the Court made a pretrial order (R. 37-39) and on October 4, 1946, made an amended pretrial order directing summary judgment for appellee. On October 4, 1946, judgments were entered dismissing both actions without trial (R. 46-47). Within the time allowed by law appellant served and filed its notice of appeal with its statement of points on appeal; and within the time provided by the Rules of Civil Procedure a transcript of record was duly prepared by the clerk of the District Court, certified by him and docketed in this Court (R. 48).

At the pretrial conference it was stipulated by counsel, and said stipulation was accepted by the Court, that the only issue in the two cases then before the Court was that raised by the special defense of the appellee that payment by the appellee of the sums sued for was expressly prohibited by the provisions of the Elkins Act and that the payment of such sums by appellee as provided in the agreement of September 28, 1933 would constitute a violation of the provisions of the Elkins Act (R. 38). Plaintiff (appellant here) insisted upon its right to a trial of that issue

and requested that the Court set the cases for trial. Without a trial or further hearing, the District Court made its order for summary judgment in both cases and entered the judgments from which the present appeals were taken (R. 37-39 inclusive and 44-47 inclusive).

The primary question involved on these appeals is as to the regularity (and legality) of the said orders of summary dismissal and the judgments entered thereon.

III.

SPECIFICATIONS OF ERROR.

Assignments of error to be argued and relied upon in both appeals are:

1. The judgment of the District Court of October 4, 1946, dismissing appellant's complaint was error.

2. The District Court erred in refusing to permit the action to be tried.

3. The judgment of the District Court of October 4, 1946, is error in that it is wholly unsupported by any findings of fact or conclusions of law.

Assignments 1 and 2 will be argued together and 3 will be argued separately.

IV.

ARGUMENT.

A. THE DISTRICT COURT ERRED IN ENTERING A SUMMARY JUDGMENT FOR THE DEFENDANT WITHOUT A TRIAL.

In its decision in the first of the companion cases (308 U. S. 422) the Supreme Court of the United States expressly held that the District Court had jurisdiction of the parties and of the subject matter of the action and remanded the case to the District Court for further proceedings. At that time the issue tendered by appellee's special defense was the single issue to be determined. It was an issue of fact dependent upon whether in the final result a payment by the defendant (Appellee here) of the sums collected and withheld by it in breach of the agreement of September 28, 1933, would enable El Dorado Oil Works (appellant's assignor) to have oil shipped by it between July 1, 1934 and May 31, 1935, at less than the published tariff rates, or to enjoy a rebate or other concession prohibited by the provisions of the Elkins Act. No trial or other proceeding whatever had been had since the case was remanded to the District Court. In the second case nothing whatever had been done since appellee's answer tendering the special defense was filed. The issue arising from the special defense was therefore an existing and untried issue of fact at the time of the pretrial conference. This was admitted by counsel and clearly appears from paragraph III of the pretrial order of the District Court (R. 38) which reads as follows:

> "It was further stipulated and agreed by counsel that the sole issue in this cause is that arising

from the affirmative defense pleaded by the defendant that said defendant was and is expressly prohibited and enjoined by law, and particularly by the provisions of the Elkins Act, from paying to plaintiff the moneys sought to be recovered by plaintiff in this action."

That the District Court committed error in denying a trial and entering summary judgment where there exists an undetermined issue of fact, was definitely decided in the following cases:

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 88 L. Ed. 967;

U. S. v. Hartford Empire Co., 1 Fed. Rules Dec. 424 at 427;

Avrick v. Rockmont Envelope Co., 155 F. (2d) 568 at 571;

Krug v. Santa Fe Pac. RR. Co., 158 F. (2d) 317;

Doehler Metal Furniture Co. v. U. S., 149 F. (2d) 130;

Wyant v. Crittenden, 113 F. (2d) 170.

In the last cited case decided by the Circuit Court of Appeals of the District of Columbia, it was held that where there was either a fact issue concerning the ownership of claims or an issue of law concerning the sufficiency of undisputed facts to constitute ownership, the District Court's action in granting defendant's motion for a summary judgment was error.

It may be urged that some of the cited decisions were rendered in the light of Rule 56 of the Rules of Civil Procedure which provides for a summary

judgment on motion, whereas the orders and the judgments entered thereon in the present cases were made in a pretrial conference covered by Rule 16. But this distinction is not material. Under whatever theory the Court acted, it dismissed the actions without granting a trial upon an admitted issue of fact. Tested by either rule the judgments constituted error. Rule 16 of the Rules of Civil Procedure provides for a pretrial conference to determine what are the issues in a given case and to regulate the introduction of evidence on a trial thereof. The rule does not authorize the summary disposition of a case on a pretrial conference without a trial of the admitted issues. In deciding *United States v. Hartford Empire Co.* (1 Fed. Rules Decisions, 424 at 427), the Court denied the right of the District Court to summarily dispose of an undetermined issue in the following language:

> "The court cannot prejudge. He does not know what the testimony will disclose. He cannot anticipate facts of his own will and motion."

Under Rule 56 the party moving for a summary judgment is required (paragraph (c)) to establish his right to a summary judgment by showing that the "pleadings, depositions and admissions on file, together with the affidavits, show that * * * there is no genuine issue as to any material fact and that the moving party is entitled to the judgment as a matter of law." On hearing of such a motion the defending parties are entitled to make a counter showing. No such opportunity was offered in the present cases by reason of the informal character of the motion with-

out previous notice to dismiss during the course of the pretrial conference. Moreover, it does not appear from the pleadings, depositions or admissions—no affidavits were filed—that there was no issue as to any material fact. The issue of fact based upon the special defense was disclosed by the pleadings and by the admissions upon the hearing. It was not a question of law. It was an issue of fact to be determined in the light of the effect of such payments when made and whether in that final result the shipper will have transported its oil at less than the published tariff rates.

Not only was there an issue as stipulated by counsel and recognized by the Court, but it was a triable issue of fact that could be determined only on evidence produced at a trial. Payment by carriers of the mileage allowance as compensation to a shipper for furnishing the tank cars was provided for by statute (Section 15 (13) of the Interstate Commerce Act). Such payments are recognized as lawful by the decisions of the Courts.

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422 at 429, 431;

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42 (56 L. Ed. 83, 87);

United States v. Baltimore & Ohio R.R. Co., 231 U. S. 274 (58 L. Ed. 218).

The decisions of the Courts have made it clear that whether an act or practice amounts to a rebate or discrimination prohibited by the Elkins Act does not turn on the intention of the parties or even upon secret

agreement designed to bypass the provisions of the statute. That question can only be determined, and must be decided, upon the proven facts and in the light of the final results to the shipper.

General American Tank Car Corporation v. El Dorado Terminal Co., supra;

Union Pacific Railroad v. United States, 313 U.S. 450 (85 L. Ed. 1453).

At the time of the pretrial conference the results to follow from the payments by appellee could have been proven to show not only that appellant would enjoy no rebate, concession or discrimination prohibited by the Elkins Act, but furthermore that appellant or its assignor, the Oil Works, would not enjoy a profit on the leasing of the cars. Such a showing would completely dispose of appellee's special defense and the issue raised thereby. Notwithstanding appellant's earnest insistence upon its right to a trial of that issue, the District Court ordered summary dismissal of the actions and entered the judgments appealed from. The Court's statement (R. 44):

> "I am of the opinion that there are no facts to be determined by the court in this litigation upon which the judgment need rest,"

cannot overcome the admitted fact that there was an undetermined and triable issue. The Court's pragmatical statement only serves to indicate the obvious error of his action.

B. A JUDGMENT OF A DISTRICT COURT UNSUPPORTED BY FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRES REVERSAL.

The summary judgments of the District Court stand unsupported in the record by any findings of fact or conclusions of law. This Court has consistently held that such a judgment constitutes reversible error.

In *Perry v. Baumann* (C.C.A. 9th), 122 F. (2d) 409, the District Court entered a judgment of dismissal, pursuant to a motion, but made no findings of fact or conclusions of law. The judgment was reversed to the same effect in

Timetrust v. Securities and Exchange Comm. (C.C.A. 9th), 130 F. (2d) 214.

The Supreme Court has likewise held that findings and conclusions are necessary in order to support a judgment. In,

Mayo v. Lakeland Highlands, etc., 309 U. S. 310, 84 L. Ed. 774,

the District Court issued a preliminary injunction, but failed to make findings or conclusions. The Supreme Court said of this situation:

> "Moreover, if appellants conceived themselves aggrieved by the action of the Court upon motion for preliminary injunction, they were entitled to have explicit findings of fact upon which the conclusion of the court was based. Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal."

V.

CONCLUSION.

Inasmuch as there was in each of these cases an undetermined issue at the pretrial conference, the District Court erred in ordering the summary judgment appealed from and the appellant is entitled to reversal.

Dated, San Francisco, California,
June 2, 1947.

Respectfully submitted,
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Nos. 11,538 and 11,539

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY, a corporation, *Appellant*, v. GENERAL AMERICAN TANK CAR CORPORATION, a corporation; GENERAL AMERICAN TRANSPORTATION CORPORATION, a corporation, *Appellees.*	No. 11538
EL DORADO TERMINAL COMPANY, a corporation, *Appellant*, v. GENERAL AMERICAN TANK CAR CORPORATION, a corporation, *Appellee.*	No. 11539

BRIEF FOR APPELLEES

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Subject Index

	Page
Foreword	1
Pleadings, Proceedings and Jurisdiction	3
Chronology	3
Statement of the Case	4
The Question	9
Argument	10
I. There Was No Untried Issue Before the District Court	10
The First Trial	11
The First Supreme Court Opinion	11
The Interstate Commerce Commission Proceeding	15
Three-Judge Court Proceeding	20
The Second Supreme Court Decision	20
Termination of Action in Three-Judge Court	23
Further Proceedings in the Assumpsit Actions	23
II. "Once the Commission Has Acted, the Court May Then Proceed to Enter Judgment in Conformity With the Terms and Conditions Specified by the Commission."	26
III. Findings of Fact Were Neither Necessary Nor Proper	27
Conclusion	30

Table of Authorities Cited

Pages

CASES

Allowances for Privately Owned Tank Cars (1944), 258 I.C.C. 371 ..... 4, 7, 15-20

Burman v. Lenkin Const. Co. (C.A.D.C. 1945), 149 F.(2d) 827 28

El Dorado Oil Works, et al. v. United States, et al., (D.C., N.D. Cal., 1945), 59 F.Supp. 738 ..... 4, 20

El Dorado Oil Works, et al. v. United States, et al. (1946), 328 U.S. 12, 66 S.Ct. 843, 90 L.Ed. 1053 ..... 4, 20-23, 26

El Dorado Terminal Co. v. General American Tank Car Corporation (C.C.A. 9th Cir., 1939), 104 F.(2d) 903 ..... 3, 11

General American Tank Car Corporation v. El Dorado Terminal Company (1940), 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361 ..... 3, 11-15

General American Tank Car Corporation v. El Dorado Terminal Company (1940), 309 U.S. 694, 60 S.Ct. 465, 84 L.Ed. 1035 3

Lindsey v. Leavy (C.C.A., 9th Cir., 1945), 149 F.(2d) 899 at 902 28

Mayo v. Lakeland Highlands Canning Co. (1940), 309 U.S. 310, 60 Sup.Ct. 517, 84 L.Ed. 774 27

Mitchell Coal and Coke Company v. Pennsylvania Railroad Company (1913), 230 U.S. 247, 33 Sup. Ct. 916, 57 L.Ed. 1472 14

Perry v. Baumann (C.C.A., 9th Cir., 1941), 122 F.(2d) 409 27

Prudential Insurance Co. of American v. Goldstein, (S.D. N.Y. 1942), 43 F.Supp. 767 28

Thompson, Trustee, et al. v. Texas Mexican Railway Company (1946), 328 U.S. 134 at 148-149, 66 S.Ct. 937 at 946, 90 L.Ed. 1132 at 1141 26

Time-Trust v. Securities and Exchange Commission (C.C.A., 9th Cir., 1942), 130 F.(2d) 214 27

Pages

Use of Privately Owned Refrigerator Cars (1934), 201 I.C.C. 323 ..... 6, 7, 8

STATUTES

Elkins Act (Act of February 19, 1903, Chap. 708, §1, 32 Stat. 847, 49 U.S.C. §41(1) and (2)) 10, 11

Urgent Deficiencies Act of 1913 (38 Stat. 219, 28 U.S.C. §41(28), §43 and §48) 20

United States
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BRIEF FOR APPELLEES

Foreword

In this litigation—which has now been in progress for more than twelve years—the appellant is seeking the recovery of certain sums of money which the Interstate Commerce Commission, by an order approved on the merits by the Supreme Court of the United States, has held would "constitute a rebate and discrimination and involve a departure from the tariff rules applicable," in violation of the Elkins Act and the Interstate Commerce

Act. The Supreme Court has also held, in specific and unmistakable language, that the question whether the payment sought would be lawful or unlawful was a question committed by law to the Interstate Commerce Commission for determination—"and not for determination by a court." No other question is at issue in these cases. Upon this state of the record, the District Court concluded that the litigation should end and accordingly ordered judgments to that effect.

Appellant is here complaining of those judgments on the ground that the District Court should have proceeded to trial upon the question of the lawfulness of the payments demanded by appellant. That issue is the same issue which the Supreme Court has held the District Court could not try. It is the same issue which the Supreme Court has held to be within the exclusive jurisdiction of the Interstate Commerce Commission. It is the same issue which the Interstate Commerce Commission has in fact heard and determined. And it is the same issue on which the Supreme Court has held that the Interstate Commerce Commission's determination was correct!

Undoubtedly it would have been reversible error for the District Court to have attempted to retry that issue. Its orders and judgments refusing to do so are manifestly correct.*

---

*Appellee General American Tank Car Corporation has been dissolved and all of its assets have been acquired and its liabilities assumed by Appellee General American Transportation Company (R. 95, 99), but under the law of the state of its incorporation (West Virginia) the dissolved corporation may continue litigation in its own name. For convenience in this brief we shall refer to both companies as "appellee" unless otherwise indicated. Likewise the appellant and its assignor El Dorado Oil Works will both be designated by the term "appellant."

The printed Transcript of Record in these appeals will be cited as "R. ....."

Pleadings, Proceedings and Jurisdiction

We agree in substance with the statements under this caption on page 2 of Appellant's Opening Brief.

Chronology

Inasmuch as this litigation is now in its thirteenth year and has been heard and decided so many different times by so many different tribunals, we set forth here, for the convenience of the Court, a brief chronological outline of the proceedings to date, with names and citations of the six reported decisions heretofore rendered:

1935—Complaint filed in the District Court in the first assumpsit action (No. 11539 herein).

1936—Stipulation of factual matters filed in the first assumpsit action (R. 29-32 herein).

1937—Complaint filed in the District Court in the second assumpsit action (No. 11538 herein).

1937—Trial of first action in District Court. Judgment for defendant.

1939—Judgment of District Court reviewed and reversed by this Court. *El Dorado Terminal Co. v. General American Tank Car Corporation* (C.C.A. 9th Cir., 1939), 104 F.(2d) 903.

1940—Judgment of this Court reviewed and reversed by United States Supreme Court and cause remanded to District Court for submission of administrative question to the Interstate Commerce Commission. *General American Tank Car Corporation v. El Dorado Terminal Company* (1940), 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361.

1940—Appellant's petition for rehearing denied by United States Supreme Court without opinion. *General American Tank Car Corporation v. El Dorado Terminal Company* (1940), 309 U.S. 694, 60 S.Ct. 465, 84 L.Ed. 1035.

1940—Petition filed by appellant with the Interstate Commerce Commission for a determination of the legality of the payments sought in both assumpsit actions

1940-1941—Hearing and argument before Interstate Commerce Commission.

1944—Decision by the Commission that the payments sought in these actions would be illegal rebates. *Allowances for Privately Owned Tank Cars* (1944), 258 I.C.C. 371.

1944—Complaint filed by appellant in statutory three-judge District Court to set aside Commission's order.

1945—After hearing, judgment entered by three-judge District Court dismissing complaint. *El Dorado Oil Works, et al. v. United States, et al.,* (D.C., N.D. Cal., 1945), 59 F.Supp. 738.

1946—Judgment of three-judge District Court reviewed and affirmed by United States Supreme Court on the merits. *El Dorado Oil Works, et al. v. United States, et al.* (1946), 328 U.S. 12, 66 S.Ct. 843, 90 L.Ed. 1053.

1946—Judgment for defendants entered by three-judge District Court pursuant to Supreme Court's 1946 mandate.

1946—Pre-trial conferences in both actions in the District Court during which the parties stipulated that the two actions are alike and that whatever order should be made in the first action should likewise be made in the second (R. 109-110).

1946—Judgments for defendants in both assumpsit actions entered by District Court in conformity with Supreme Court's mandates of 1940 and 1946 (R. 46 and 113).

1947—Appellees' motion to dismiss these appeals denied by this Court (the order was made May 5 instead of June 5 as stated at page 2 of Appellant's Opening Brief).

Statement of the Case

With one important exception discussed below, and with certain minor exceptions enumerated in the footnote,* we

---

*(a) The period covered by the second action is May 31, 1935 to January 31, 1937 (R. 91-97), rather than May 31, 1934 to January 1, 1937, as stated on page 2 of Appellant's Opening Brief.

(b) The term of the contract was three years instead of two, as stated on page 3 of Appellant's Opening Brief—see the full text of the contract in the printed Record, at pages 20 to 28, particularly the Fourth Paragraph at R. 24.

(c) The second date mentioned near the middle of page 4 of Appellant's Opening Brief should be May 31, 1935, instead of May 31, 1945 (R. 2 and 29).

(d) The investigation by the Interstate Commerce Commission was not "limited" as stated near the top of page 5 of Appel-

are content to accept as adequate for the purpose of these appeals the "Statement of the Case" appearing upon pages 3 to 7 and the preliminary paragraph on pages 1 and 2 of Appellant's Opening Brief. More complete recitals of the factual background and history of this controversy may be found in the five reported opinions heretofore rendered at successive stages of this litigation, all cited above in the chronological outline at pages 3 and 4 hereof.

As previously noted, we disapprove of appellant's "Statement of the Case" in one important respect. We refer to appellant's failure to disclose the significance of the two reports and orders of the Interstate Commerce Commission bearing directly upon this controversy. Appellant does not even mention the first report of the Commission though it was the immediate cause of this litigation. Appellant does mention the Commission's later report and order ruling upon this very controversy, but appellant's reference to it is altogether inadequate—appellant says merely that "on April 10, 1944, the Commission released a decision and order" (App. Op. Br. 5), without stating the nature of the decision or the substance of the order. These two determinations of the Interstate Commerce Commission are of primary significance. Yet appellant completely ignores the first and virtually ignores the second!

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lant's Opening Brief. It was fully responsive to appellant's petition for an investigation. Appellant was in no wise restricted in the presentation of its case. The proceeding was a complete investigation of the lawfulness of the practices disclosed by these actions, and all railroads concurring in the relevant tariffs were parties respondent (258 I.C.C. 370, 373-4).

The first of these two Commission reports—the one to which we have referred as the immediate cause of this litigation—was in

Use of Privately Owned Refrigerator Cars (1934), 201 I.C.C. 323.

That decision was released on July 2, 1934. It was concerned with refrigerator cars rather than tank cars, but in all important respects it dealt with facts and practices substantially similar to those here involved. The nature of that decision, and the effect of it upon the present controversy, are described by the Supreme Court in its first opinion in this litigation as follows:

> "The petitioner [appellee herein] complied with the provisions of the agreement until July 2, 1934, when the Interstate Commerce Commission rendered its decision in Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323, in which it considered the payment of mileage allowances to shippers either directly or through car owners, which payments exceeded the total of the agreed rental for the use of the cars and any additional actual expenses of the shipper in connection with the cars. In that case the Commission held that such payments operated to give the lessee transportation of his products at lower rates than those paid by other shippers who use cars furnished by the carriers and thus amounted to a rebate from the published transportation rates. The petitioner's practice had been to collect the mileage, deduct the rental due, and pay over the balance monthly. After the rendition of the Commission's decision the petitioner collected the mileage from the railroads, credited the Oil Works [appellant herein] with the rental due, retained the

> balance, and refused to pay it over. The ground of its refusal was that to follow the former practice would render it a participant in illegal rebating." (308 U.S. at 426)

Appellee's discontinuance of excess mileage payments to appellant in July, 1934, occurred immediately after the announcement of the *Refrigerator Car* decision on July 2, 1934, and as a direct consequence thereof. The parties have stipulated that such was the reason for appellee's action, that in so doing appellee acted upon advice of counsel, and that a full copy of the Commission's report and order in the *Refrigerator Car* case should be incorporated in the record (R. 31). Appellant's omission of any reference to this report would lead one to assume that appellee's discontinuance of the excess mileage payments was arbitrary and without reasonable cause (see App. Op. Br., pp. 3-4). The stipulated and undeniable facts are, of course, quite to the contrary.

The second of the two Interstate Commerce Commission decisions, which appellant so lightly passes over in its recital of the history of this litigation, is the report and order passing upon the validity and reasonableness of the very payments which appellant is here seeking to recover:

> *Allowances for Privately Owned Tank Cars* (1944), 258 I.C.C. 371.

We have already noted that appellant misdescribes the Commission's proceeding as a "limited" investigation when in fact it was not limited. But more important is appellant's failure to reveal what the Commission held! It held that the payments which appellant is here seeking

to recover would, if made, be illegal—that they would "constitute a rebate and discrimination and involve a departure from the tariff rules applicable * * *", in violation of the Elkins Act and the Interstate Commerce Act. The Commission expressly approved "the principles applied in the *Refrigerator Car Case* as related to the situation here involved" (258 I.C.C. at 380), viz., the tank car leasing arrangement between appellant and appellee. The significance and controlling effect of this decision must be obvious.

Again, appellant understates the Supreme Court's decision in relation to the Commission's order. The Court did not hold merely that the Commission "had determined the questions submitted to it by the previous decision of the Court" (App. Op. Br. p. 5). The Court went much further and, after disposing of appellant's diverse attacks upon the soundness and propriety of the Commission's action, held in express words "that the Commission's order is valid" (328 U.S. at 22).

Certainly a recital of what the Commission decided and what the Supreme Court said of its decision must be presented to this Court in order that it may determine whether the District Court acted properly in concluding that the "sole issue in this cause has been conclusively determined in favor of the defendant [appellee herein] and against the plaintiff [appellant herein] by the Interstate Commerce Commission" (R. 38), and that "there are no facts to be determined by the court in this litigation" (R. 44).

The foregoing will, we think, supply the important historical facts omitted from appellant's "Statement of the Case."

The Question

The question for decision is whether the District Court erred in declining to retry an issue—the sole issue in the case—which the Supreme Court had held to be an administrative question for determination exclusively by the Interstate Commerce Commission and which the Interstate Commerce Commission had finally determined in a decision approved on the merits by a second opinion of the Supreme Court.

If the District Court was bound to undertake to try that issue, after the Supreme Court had held it must not do so and had later upheld as valid the determination of that issue by the Interstate Commerce Commission, then these judgments should be reversed. Otherwise, they should be affirmed.

ARGUMENT

I.

There Was No Untried Issue Before the District Court

For reasons not clear to us, the appellant has seen fit to present its entire argument without a single reference to the decision by the Interstate Commerce Commission, adverse to appellant, upon the very issue which the appellant insists has never been tried. Appellant wholly ignores that decision. If one were to accept appellant's argument at face value one would assume that the lower court had summarily ordered a dismissal of a case which was at issue and had never been tried, either in the same court or elsewhere. Such is not the situation.

Entirely incomprehensible are the assertions in Appellant's Opening Brief (pages 8 and 12) that we have "admitted" that the issue is untried. Those assertions are contrary to fact. There has been no such admission on the part of appellee.

Our contention has been and is that the issue had been tried and decided by the only tribunal competent to do so—the Interstate Commerce Commission—and that there was literally nothing left to be tried by the District Court. For this purpose we shall briefly review the prior proceedings. Before doing so, however, we wish to emphasize the fact that the *only* issue in these cases is the single one raised by appellee's affirmative defense, namely, the issue whether the payment of the sums in dispute is prohibited by the provisions of the Elkins Act forbidding rebates, concessions and discrimination (Act of February 19, 1903,

Chap. 708, §1, 32 Stat. 847, 49 U.S.C. §41(1) and (2)). The parties have stipulated that this is the only issue in both cases (R. 38 and 110), and there can be no misunderstanding on that score. (See Appellant's Opening Brief, page 6, to the same effect.)*

The First Trial.

The first event which should be considered is the first trial of this issue in the District Court. That was a complete trial of the issue, the court sitting without a jury and making both findings of fact and conclusions of law. The decision on this issue was in favor of the appellee. The District Court held that the payment of the amounts sought would constitute unlawful rebates in violation of the Elkins Act. Judgment was accordingly entered for the appellee. (See the description of this trial and decision in the opinion of this Court reversing that judgment, 104 F. (2d) 903.)

In other words, the District Court in that trial some ten years ago did try and decide exactly the same issue which the appellant now contends it should try again!

The First Supreme Court Opinion.

After reversal by this Court, the case reached the Supreme Court by writ of *certiorari*. In due time the Supreme Court rendered its unanimous opinion (308 U.S. 422)—its first opinion in this litigation—reversing the

*The single issue in this litigation is characterized in appellant's brief as "an issue of fact" (pp. 8, 10, 11). Whether it be an issue of fact or an issue of law is immaterial. It is enough that the issue was held by the Supreme Court to have been "subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission."

decision of this Court and remanding the case to the District Court for further proceedings in conformity with its opinion.

The substance of the Supreme Court's opinion is briefly stated in the concluding paragraphs, as follows (omitting footnotes):

> "* * * If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case. The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.
>
> "As the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission. The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court.

"We have said that the Commission insists the District Court was without jurisdiction of the cause. With this we do not agree. The action was an ordinary one in assumpsit on a written contract. The court had jurisdiction of the subject matter and of the parties. But it appeared here, as it did in *Mitchell Coal Co. v. Pennsylvania R. Co.* 230 U.S. 247, that the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission. The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibitions of the Elkins Act, are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders.

"When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in *Mitchell Coal Co. v. Pennsylvania R. Co.,* supra, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.

"The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings in conformity to this opinion.

"Reversed." (308 U.S. 431-433)

Particular attention is directed to the statement that the only function of the courts is to enforce claims arising out of failure to comply with the Commission's lawful orders, and the statement that the reason for not ordering an outright dismissal is to save to the petitioner (appellee herein) any defenses it may have. In the latter connection the Court referred to the somewhat similar case of

> *Mitchell Coal and Coke Company v. Pennsylvania Railroad Company* (1913), 230 U.S. 247, 33 Sup. Ct. 916, 57 L.Ed. 1472,

wherein the Supreme Court concluded its opinion with the following sentence:

> "But owing to the peculiar facts of this case, the unsettled state of the law at the time the suit was begun and the failure of the defendant to make the jurisdictional point *in limine* so that the plaintiff could then have presented its claim to the Commission and obtained an order as to the reasonableness of the practice or allowance,—direction is given that the dismissal be stayed so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice and the allowance involved; and, if in favor of the plaintiff, with the right to proceed with the trial of the cause in the District Court, in which the defendant shall have the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have." (230 U.S. at 266-267)

The conclusions necessarily to be drawn from the Supreme Court's first opinion are: *first,* that the Dis-

trict Court erred in trying the issue raised by the affirmative defense under the Elkins Act; *second,* that the issue should be referred to and decided by the Interstate Commerce Commission; *third,* that if the Commission should hold in favor of the appellant, viz., that the payments sought would not be rebates, then the case should proceed to a retrial in the District Court so that any other defenses the appellee might have could be presented and considered; and *fourth,* that if the Commission should rule in favor of the appellee, viz., that the payments would be rebates and therefore unlawful, then the appellant could not recover in any event and the District Court would have no further function to perform.

For purposes of the present appeals it is of utmost importance to observe the first of these four conclusions, namely, that the District Court erred in undertaking to try the issue raised by the affirmative defense under the Elkins Act. The significance of such holding must be obvious: the Supreme Court squarely held that the District Court erred in trying the very same issue which appellant now contends the same court erred in refusing to try again! This decision of the Supreme Court is more than an apt precedent, or a "case in point"—it is a decision on the identical question and in the identical action here involved. It is the "law of the case."

The Interstate Commerce Commission Proceeding.

After the remand to the District Court, appellant filed a petition with the Interstate Commerce Commission seeking a determination by it of the same issue which the District Court had tried, which the Supreme Court had

held could not be tried by a court, and which appellant now contends the District Court should try again—namely, the issue of whether the payments here sought could be made lawfully or would violate the Elkins Act. The prayer of the appellant's petition to the Commission is quoted in full in the Commission's report, as follows:

> "Wherefore, the petitioners pray that the Commission cause an investigation to be made of the practices disclosed by the said action, and in the said opinion of the United States Supreme Court, and after such investigation and such hearing as the Commission may desire, the Commission enter its order holding that payment by the General American Tank Car Corporation to petitioners of the amounts so collected by said tank car corporation as mileage allowance for the use of the tank cars leased by petitioners and furnished by them to the railroad carriers may be made as provided in and for the entire period covered by the agreement of the parties dated September 28, 1933, without the violation of any provisions of the Elkins Act, and that the payments so made are reasonable and will not accomplish a rebate, concession or an advantage or discrimination in favor of either of the petitioners or in violation of the provisions of the Elkins Act, and that such other and further order or orders be made as the Commission may consider proper in the premises." (258 I.C.C. at 373)

Upon that petition the Interstate Commerce Commission made an order of investigation to determine:

> "(1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;

"(2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and

"(3) what findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist." (258 I.C.C. at 374)

In its report the Commission expressly embraced any questions arising under the Elkins Act as well as those under the Interstate Commerce Act (258 I.C.C. 374).

As recited in the Commission's report, the Commission held a hearing, in which the parties to this litigation as well as all affected railroads participated. Briefs were filed, a proposed report was issued, exceptions and replies were filed, and oral argument was heard. Finally, on April 10, 1944, the Commission issued its report which is reproduced in full in the official reports of the Commission (258 I.C.C. at pages 371 to 388). The Commission determined that the payments demanded in the two actions (i.e., the excess of the mileage payments over and above the lease rental) "* * * would, in our opinion, constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6(7) of the Interstate Commerce Act, and we so find" (258 I.C.C. at 377).

The parties have stipulated herein that the Court may take judicial notice of the Commission's report and its

concurrent order discontinuing the proceeding (R. 37 and 109). Appellant filed a petition for rehearing which the Commission denied on July 31, 1944.

The Commission summarized its analysis of the issue in the following paragraph near the end of its report:

> "The present record shows how under contracts such as the one between the Oil Works [appellant herein] and the Tank Car Corporation [appellee herein], the Oil Works, as shipper, would reap a profit on the leased cars so substantial in amount, if paid over by the rail carriers out of the transportation charges through the Tank Car Corporation to the Oil Works, as to have the result of enabling the Oil Works thereby to obtain the transportation of the commodity it ships in interstate commerce at a lower cost than others who use cars assigned to them by the carriers, or who own their own cars. It shows that the abuses found to exist as to refrigerator cars would measurably exist under the terms of the contract, if such terms were observed. We therefore approve the principles applied in the *Refrigerator Car Case* as related to the situation here involved." (258 I.C.C. at 379-380)

The report of the Commission ended with the following findings and conclusions:

> "We therefore conclude and find:
>
> "(1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the

Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

"(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement; in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

"(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936.

"On [*Sic*] order will be entered discontinuing this proceeding." (258 I.C.C. at 380-381)

This determination is a complete disposition of the issue which the appellant now says has never been tried. The Commission held, in express terms, that the amount of the car rental was the maximum amount which could lawfully be paid to the appellant under the agreement between the parties, and that that amount had already been paid. There is, then, no further amount which can be paid without violating the law by enabling the appellant to se-

cure an illegal freight advantage over its competitors through profiting on its car rental arrangements.

Three-Judge Court Proceeding.

Not content with the Commission's determination, the appellant in 1944 commenced an action in the District Court attacking the Commission's order under the provisions of the Urgent Deficiencies Act of 1913 (38 Stat. 219, 28 U.S.C. §41(28), §43 and §48). Three judges heard the cause. The court held that it was without jurisdiction to pass upon the Commission's order and dismissed the action (59 F. Supp. 738).

The Second Supreme Court Decision.

On a direct appeal by the present appellant from the judgment of the three-judge court, the Supreme Court rendered its second opinion in this litigation (328 U.S. 12). It held that the three-judge court had erred in declining jurisdiction, and it then proceeded to consider the Commission's order on the merits. The Supreme Court first considered and rejected appellant's contention that the Commission had exceeded its authority in undertaking to determine the justice and reasonableness of allowances which appellant was to receive on past transactions. On this subject the Court said in part:

> "On the merits, appellants' major contention is that the Interstate Commerce Act and our earlier opinion in this case do not authorize the Commission to determine, as it here has done, the justice and reasonableness of mileage allowances which appellants were to receive on past transactions. The contention is that both our opinion and the Act authorize the Commission to do no more than determine what

uniform allowance shippers as a class would be permitted to charge in the future. In part the argument is that insofar as the order is based on a treatment of shipper-lessees as a class apart, and on a limitation of their allowance to the cost to them of the cars they furnish, the order is invalid, in that it neither rests on, nor brings about, a uniform rate to all shippers, or even all shipper-lessees. We cannot agree with the above contentions.

"First, it must be noted that the Commission made its determination as to the lawfulness of these past practices on the basis of appellants' own application, asking the Commission to do so. Second, our previous opinion, as well as the Interstate Commerce Act, authorized the Commission to make this determination. The question before us when this case was first here did not relate to future but to past allowances. Relying on past decisions, we held that the 'reasonableness and legality' of the past dealings here involved were matters which Congress had entrusted to the Commission. See e.g., *Great Northern R. Co. v. Merchants Elevator Co.* 259 U.S. 285, 291, [63 L.Ed. 943, 946, 42 S.Ct. 477, 479], and other cases cited in our previous opinion. And we rejected appellants' petition for rehearing which presented substantially the argument now repeated, namely that any order the Commission might make 'could only be effective as to the future,' that the Commission's determination 'could not affect the contract . . . in this case,' that the Commission's action would be 'futile,' and that consequently our judgment and opinion would provide no 'guidance' for the District Court. Our first opinion, buttressed by our rejection of the motion for rehearing, was a plain authorization for the Commission to determine the justice and reasonableness of the past allowances to this shipper. The Commission did not

> have to establish future uniform rates to determine the questions we sent to it. Consequently, insofar as appellants' argument is that the Commission failed to treat all shippers or all shipper-lessees uniformly because it did not fix future uniform rates, the answer is that it was not required to do so." (328 U.S. at 19-20)

The Supreme Court then considered appellant's other attacks upon the Commission's determination, including appellant's attack upon the sufficiency of the evidence. The Court held "that the Commission's order is valid" (328 U.S. 22) and affirmed the judgment of dismissal expressly on that ground. In its opinion the Supreme Court said further:

> "* * * For supplying these cars, it [the "Oil Works", appellant herein] could not consistently with §15(13), receive from the railroad, directly or indirectly, more than a 'just and reasonable' allowance. This allowance was 'in respect to transportation.' See *Union Pacific R. Co. v. United States,* supra, 462 [313 U.S. 450, 61 S.Ct. 1064, 1072, 85 L.Ed. 1453, 1464]. Payment by the railroad of more than the just value of the services inevitably resulted in its carrying Oil Work's product at less than the regular freight rate, even though it collected the full rate from the consignees. The reduced rate at which Oil Works could thus have its products transported justified the Commission's finding that Oil Works got a concession and an advantage over other shippers who made no such profits on tank cars. Whether Oil Works or its consignees paid the freight makes no difference. Cf. *Elgin J. & E. R. Co. v. United States*

[(C.C.A. 7th)] 253 F. 907, 911. A practice which accomplishes this result is prohibited by the Interstate Commerce Act and the Elkins Act." (328 U.S. at 22)

We pause briefly to point out here that it is exactly that "concession" and that "advantage over other shippers" which appellant is still trying to realize in these appeals. If the Court believes that the appellant should be entitled to go forward with actions for sums so characterized by the Supreme Court of the United States, in approving the final determination of the Interstate Commerce Commission holding that payment of such sums would be unlawful, then, but only then, the Court should reverse the judgments.

Termination of Action in Three-Judge Court.

Upon receipt of the mandate from the Supreme Court following its second opinion, the District Court of three judges on July 19, 1946, made and entered its "Order on Mandate" dismissing the appellant's complaint. The parties have stipulated (R. 38 and 109) that the Court may take judicial notice of that Order on Mandate, which is important here because it constitutes the final termination, at long last, of the "appropriate administrative proceeding" called for by the first Supreme Court opinion in 1940 (308 U.S. at 433).

Further Proceedings in the Assumpsit Actions.

As matters then stood, the District Court had before it in the assumpsit actions the final and judicially approved determination by the Interstate Commerce Commission of the sole issue in the case, namely, the defense under the

Elkins Act. The Commission had determined that issue against the appellant, holding in express terms that no amounts could lawfully be paid under the agreement over and above what had already been paid. Nothing could be paid on appellant's claims, in other words, without violation of law. That determination established the validity of the appellee's defense *in toto,* and it was in and of itself a complete and final answer to appellant's claims.

Upon that state of the record there was plainly nothing further for the District Court to do except enter judgment for the appellee in conformity with the determination by the Commission. Since that determination was in favor of the appellee there was no occasion for the District Court to consider the appellee's other defenses, as the Supreme Court had said the District Court might be called upon to do if the administrative determination should have turned out the other way (308 U.S. at 433). There was not even any occasion for the District Court to examine into the validity of the Commission's order, for the appellant had seen fit to test the order in a three-judge court action which had resulted in a full examination and approval of the order by the Supreme Court (328 U.S. 12).

There was, then, no "untried" issue. The only issue in the case had been "tried" and decided by the only tribunal competent to decide it, the Interstate Commerce Commission. It would have been reversible error for the District Court to retry the issue, just as it was held in error for having tried it in the first instance (308 U.S.

422). Nothing whatever remained for the Court to do except to dismiss the cases.*

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*Appellant's brief (p. 12) advises that, if trial had been permitted, it could have been proven "that appellant would enjoy no rebate, concession or discrimination prohibited by the Elkins Act * * *" through the payments sought from appellee. (It will be noted that the appellant has here defined the precise issue, under the Elkins Act, which the Commission was called upon to determine.) Appellant adds: "Such a showing would completely dispose of appellee's special defense and the issue raised thereby." But the Commission has already disposed of this "special defense and the issue raised thereby," and has done so authoritatively and finally.

Appellant has thus made it exceedingly clear that it endeavored, although unsuccessfully, to persuade the District Court to retry the exact issue which was entrusted to the Commission and which was decided by the Commission. The Court's attention should be drawn to the admission of appellant's counsel in the course of pre-trial that he was "*unfortunately in the position of having to find fault with the Supreme Court's theory of it, and also the theory of the Interstate Commerce Commission*" (R. 56). (Emphasis supplied)

findings. Neither these cases nor the general rule which they apply can be said to be pertinent here, for the following reasons, any one of which is sufficient alone:

(a) Here the District Court held no trial—the Supreme Court had forbidden it to try the only question at issue.

(b) Here the only issue had been heard and conclusively determined by another tribunal, the Interstate Commerce Commission, which had made its own findings and conclusions (258 I.C.C. 371, at 380-381), and that determination had been approved on the merits by the United States Supreme Court (328 U.S. 12).

(c) Neither findings nor conclusions are necessary in summary judgment proceedings (which, as the appellant says on page 10 of its brief, are not materially different from the pre-trial proceedings here involved).

Lindsey v. Leavy (C.C.A., 9th Cir., 1945), 149 F. (2d) 899 at 902:

> "Since a summary judgment presupposes that there are no triable issues of facts, findings of fact and conclusions of law are not required in rendering judgment, although the court may make such findings with or without request. Failure to make and enter findings and conclusions is not error."

See also

Burman v. Lenkin Const. Co. (C.A.D.C. 1945), 149 F. (2d) 827;

Prudential Insurance Co. of America v. Goldstein, (S.D. N.Y. 1942), 43 F. Supp. 767.

Clearly, the general rule requiring findings and conclusions has no application here. The Interstate Com-

merce Commission had made detailed findings of fact upon the issue under the Elkins Act (258 I.C.C. at 380-381), and the United States Supreme Court had held those findings were supported by the evidence (328 U.S. at 22). Not only was it unnecessary, but it would have been reversible error for the District Court to make findings on issues which it could not try in the first instance and which had in fact been conclusively determined by the appropriate tribunal. The District Court did all that was demanded of it when it referred in its pre-trial orders to the proceedings by which appellee's affirmative defense had been fully and finally established as a complete bar to these actions. There was no duty imposed upon it to make any findings of fact.

CONCLUSION

In its first opinion some seven years ago the Supreme Court held that the only issue in these cases could not be tried by the court but was an "administrative problem" committed by law to the exclusive jurisdiction of the Interstate Commerce Commission. It ordered the District Court to "stay its hand" pending the conclusion of an "appropriate administrative proceeding" for determination of that issue.

The District Court duly stayed its hand until there were presented to it, in 1946, an opinion and order of the Interstate Commerce Commission conclusively determining that sole issue and a second decision of the United States Supreme Court approving that determination on the merits. The District Court then satisfied itself that the Commission's determination had been in favor of the appellee and that there was no further action required of the Court. It proceeded without further delay to order judgments for the appellee in conformity with the Commission's determination.

The appellant's primary contention is that the Court should have undertaken to retry the issue which had been tried and set at rest by the Interstate Commerce Commission. The Court had once before undertaken to try that issue, and the Supreme Court had held in its first

opinion that this was error. Certainly, the Court's refusal to repeat the same error was proper.

The judgments should be affirmed.

Respectfully submitted,

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July 16, 1947.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), GENERAL AMERICAN TRANSPORTATION CORPORATION (a corporation), *Appellees.*	No. 11,538
EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), *Appellee.*	No. 11,539

APPELLANT'S REPLY BRIEF.

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	Pages
El Dorado Oil Works, et al. v. United States, et al., 328 U. S. 12, 90 L. Ed. 1053	19, 20
General American Tank Car Corporation v. El Dorado Terminal Company, 308 U. S. 422	3, 6, 12, 20, 22
Mayo v. Lakeland Highlands, etc., 309 U. S. 310, 84 L. Ed. 774	23, 24
Perry v. Baumann, 122 F. (2d) 409	23
Thompson, Trustee, et al. v. Texas Mountain Railroad Co., 328 U. S. 134	22
Timetrust v. Securities and Exchange Comm., 130 F. (2d) 214	23
U. S. v. Hartford Empire Co., 1 Fed. Rules Decisions 424	21

Statutes

Interstate Commerce Act, Section 15 (13) ..5, 10, 13, 14, 15, 16, 17

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), GENERAL AMERICAN TRANSPORTATION CORPORATION (a corporation), *Appellees.*	No. 11,538
EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), *Appellee.*	No. 11,539

APPELLANT'S REPLY BRIEF.

The Brief for Appellees is divided into sections, entitled as follows: "Foreword", "Chronology", "Statement of the Case", and "Argument". However designated, all of these parts, including the "Chronology", are made up of argument. We have vainly

tried to rearrange the points of argument advanced by Appellees and correlate them with the questions involved in these appeals, namely: (A) Was there an issue tendered by Appellees' answer to the complaints in the District Court?; (B) Was such issue triable in the District Court?; (C) Was the issue so tried?; and (D) Did the decisions or the mandates of the Supreme Court direct or authorize the District Court to summarily dismiss the actions and deny Appellant a trial of the issue?

At pages 3-7, inclusive, in its Opening Brief Appellant made a statement of the case and the questions involved. In their brief Appellees accept the statement, with what they term certain minor exceptions, to which we shall briefly refer in the interest of exactitude before submitting our argument. Appellees' first exception to Appellant's statement is a charge that Appellant's Opening Brief failed "to disclose the significance of the two reports and orders of the Interstate Commerce Commission bearing directly upon this controversy" and "that Appellant does not even mention the first report of the Commission though it was the immediate cause of this litigation". In the same category is the claim advanced by Appellees, that Appellant's reference to what is called "the Commission's later report and order" merely stated "that on April 10, 1944 the Commission released a decision and order, without stating the nature of the decision or the substance of the order". These challenges to the sufficiency of the Appellant's statement point the error which seems to have pursued counsel

for Appellees throughout their treatment of the cases. The District Court based the orders and the judgments under attack in the present appeals entirely upon the decisions of the United States Supreme Court and the mandates following those decisions. Therefore, no good purpose could have been served by an elaborate review of the decisions of the Interstate Commerce Commission. In the first place, an issue of fact pending in an assumpsit action in the District Court could not have been tried by the Interstate Commerce Commission to the exclusion of the District Court. Secondly, the Supreme Court of the United States held (408 U. S. 322) that the District Court had complete jurisdiction of the action and of the parties, and that jurisdiction necessarily continued until a judgment was rendered after trial. One of the present actions, No. 11,538, was never called for trial in the District Court or elsewhere, and no action whatever was taken between the filing of the answer and the pre-trial conference. In the other action there was a trial. The judgment of the District Court was reversed by this Court (104 Fed. (2d) 903) which set the judgment at large and which was followed by a decision of the Supreme Court in *General American Tank Car Corporation v. El Dorado Terminal Company,* 308 U. S. 422. The decision of the Supreme Court reversed this Court and remanded the case to the District Court for further proceedings, that is, a trial, following an appropriate proceeding by the Interstate Commerce Commission.

The report of the Commission in the proceeding entitled "Use of Privately Owned Refrigerator Cars" (201 I.C.C. 325) to which Appellees refer as, "the first order" was a report dealing only with abuses attendant upon the use of refrigerator cars. The decision and the order of the Commission expressly excepted tank cars from the effect of that order. The decision also expressly recognized that a shipper lessee was entitled, under the Elkins Act and the Commerce Act, to collect from the carriers, in the form of mileage compensation, not only the amount paid as car rentals, but "any additional actual expense of the shipper in connection with the cars". These features appear in the portion of the Supreme Court's decision quoted at page 6 of the Brief for Appellees and have significance on this appeal. If, as stated, the Commission expressly excepted the use of tank cars from the operation of its decision and order, in the refrigerator car case, that decision is not pertinent to the present cases which deal only with the use of tank cars and not refrigerator cars. Again, the holding by the Interstate Commerce Commission that a shipper lessee was entitled to collect from the carriers not only its car rentals but its other actual expenses in connection with the cars, is directly opposed to the contentions of the Appellees on their appeal. That holding constitutes a perfect answer to Appellees' next contention that it discontinued the mileage payments to Appellant, provided for in the car lease agreement, in excess of the car rentals, because of the decision in the refrigerator car case. In that decision, as above

stated, the Commission expressly held that a shipper lessee was entitled to claim not only the car rentals but its actual expenses in connection with the cars. The amount and the necessity of those expenses are matters that could have been developed on the trial of the present cases under the issue tendered by defendant's answers. It is a fair inference from the course that Appellees have pursued that they have only desired to retain the unjust enrichment received by them in violation of the provisions of Section 15 (13) of the Interstate Commerce Act and in breach of their agency created by the car lease agreement. We do not labor this point because it is wholly irrelevant to the present appeals. The merit of the special defense pleaded by Appellees in this action did not, and could not, turn upon Appellees' motives in breaching the car lease agreement.

In further criticism of Appellant's statement of the case Appellees assert that the second cited order of the Commission passed upon the validity of the payments claimed by Appellant in the present actions and that Appellant's statement incorrectly referred to the Commission's proceedings as a "limited investigation". The first of these claims clearly evidences the mistaken theory of Appellees that the Interstate Commerce Commission could decide an issue pending in the United States District Court which had, according to the pronouncement of the Supreme Court, complete jurisdiction of the subject-matter of the action and of the parties. Moreover, the investigation of the Commission could not and did not pass upon the validity,

in the light of the final results obtained, of *payments that had not yet been made.* (328 U. S. 17, 19, 20.) The Commission, as appears in the portion of the report quoted on pages 18 and 19 of Appellees' Brief, only dealt with payments made by the Tank Car Corporation under the car leasing agreement prior to the institution of these actions. Referring to such past payments, the Commission held that the car rental "was the only cost incurred * * * in furnishing the tank cars" and that "a just and reasonable allowance as maximum *to have been paid by the respondent rail carrier or carriers* to the Oil Works for the furnishing of such cars *would have been an amount not to exceed* such rental", and that "such an amount and allowance *has been paid to the Oil Works* through credits made by the Tank Car Corporation". (Italics supplied by us.)

Answering the argument of Appellant that the validity of previous payments was not involved in the Commission's investigation and that the question committed to the Commission by the decision of the Supreme Court in *General American Tank Car Corporation v. El Dorado Oil Works,* supra, was whether the Commission should cancel the order that payments would not be made to the shipper lessee, and direct that the carriers should in the future provide for uniform payment of the earned mileage to the shipper lessee and publish that change. This would have conformed to the decision of the Supreme Court that under the plain provisions of Section 15 (13), the shipper lessee, having furnished the cars, was entitled

to the earned mileage and that the carriers could not make payments to others. The Supreme Court on the second case held that the question committed to the Interstate Commerce Commission involved the validity of those previous payments and that the Commission had properly so decided. (328 U. S. 17, 19, 20.)

Appellees' claim that the statement of the case set out in Appellant's Opening Brief "misdescribed the Commission's proceeding * * * as a limited investigation" is answered by the last paragraph of the Commission's decision. After commenting on the insufficiency of the record before it, the Commission there states: "Were we to attempt to determine the reasonableness of allowances for a class of tank cars such as these, we cannot tell how far-reaching the investigation would have to be." That was a matter committed to the Commission by Section 15 (13) of the Interstate Commerce Act, and it was one of the questions made subject to investigation by the order of the Commission itself. The above quoted passage from the decision clearly shows that for reasons of its own, which were criticized by the dissenting opinion of three of the Commissioners, the Commission failed to investigate or determine what was a reasonable allowance to be made for the use of tank cars, generally. The investigation was therefore obviously a "limited investigation", as stated in Appellant's Opening Brief.

The foregoing, we believe, disposes of the repetitious statement in the Brief for Appellees that the Interstate Commerce Commission had decided the

identical questions raised by the special defense in these cases and also points the error of Appellant's claim that the decision of the Supreme Court approving the report of the Commission determined the issue in the instant cases in favor of Appellees. If we should grant, which we do not, that the opinion of the Supreme Court approved the decision and order of the Commission in its entirety, it certainly could not enlarge that decision or broaden its effect.

We now turn to that portion of Appellees' Brief captioned "Argument". In earlier pages we indicated that the first question presented on these appeals is as to whether the case before the District Court, presented an untried issue. The record is very clear and it is conceded by Counsel on both sides that the special defense pleaded by the Tank Car Corporation was that the payment to the Oil Works of the mileage collected by the former for the furnishing of the tank cars to the carriers is expressly prohibited and enjoined by law and particularly by the provisions of the Elkins Act.

It was stipulated by Counsel at the pre-trial conference and so stated in Paragraph III of the pre-trial Order of the District Court (R. 38) that the abovementioned *is the sole issue in these cases.* That Stipulation of Counsel in the present tense was accepted by the Court, it justified Appellant's contention that the issue was, at the date of the Stipulation, an untried issue. It does not lie with opposing Counsel to treat an express admission made in open Court, as a "bird of falcon" to be recalled at pleasure, and Counsel for

Appellees may not now claim contrary to their Stipulation.

It is significant that at no point in their brief do they claim that the issue was tried by the District Court, or by any Court. As stated by them their "contention has been, and is, that the issue had been tried and decided by the only tribunal competent to do so—the Interstate Commerce Commission". We have previously asserted—we think correctly—that the "Interstate Commerce Commission" was not either under the Judiciary Act, or any other statute, authorized to try an issue pending before a District Court, especially where the Supreme Court had held that the District Court had complete jurisdiction of the subject matter and of the parties. We also insist that the Supreme Court could not—and we submit did not—attempt to assume the authority of the Congress and vest in the Commerce Commission the jurisdiction to usurp the functions of the District Court.

Not entirely satisfied with their contentions that the "Interstate Commerce Commission" had tried and decided the issue, Counsel next assert, or at least infer, that the District Court on the trial of the first case No. 11,539 completely tried the issue. They admit, however, that the decision was reversed by this Court. (104 Fed. (2d) 903.) This set at large the decision of the District Court and, therefore, left the issue untried.

The questions viewed by the Supreme Court as administrative questions involved:

1. The fact that a shipper lessee receiving a mileage allowance in excess of the car rentals might in the final result obtain transportation at a lower cost than others who did not rent cars;

2. That the provision of existing tariffs denying payment of the mileage allowance to a shipper lessee directly constituted a departure from the express provisions of Section 15 (13) of the Act; and

3. That a shipper, who had incurred expenses over and above the car rentals in connection with the furnishing of the cars, was entitled to reimbursement of those expenses as a part of the compensatory allowance. Under the Court's decision these questions constituted the matters calling for the administrative judgment of the Commission after full investigation. They are all embraced within the authority vested in the Commission by Section 15 (13) of the Act, but they could, and should, be disposed of in a proceeding under that section to determine what is a just and reasonable compensation to be paid by carriers to a shipper furnishing a facility or other service to the carrier for transportation purposes. In fixing the uniform compensation, the Commission could and should take into consideration that some shippers might enjoy a profit from an allowance that would not profit another; also that some shippers, like appellant, would be put to some expense in preparing the cars for transportation uses and that the car-owners, not being the shipper or furnishing the cars should not be permitted to profit any from tariffs or mileage compensation. A cancellation of the restriction and

a general provision for the payment to all shipper lessees as a class for facilities by them furnished should be made by the Commission with universal effect and included in the published tariffs. But these questions did not, directly or indirectly, involve the issue, admitted to be the sole issue, in the present cases, that the payment by the Tank Car Corporation in accordance with its agreement of the mileage by it received from the carrier for the services rendered by the shipper lessee was expressly prohibited and enjoined under the language of the Elkins Act. Examination of the Elkins Act will disclose that the payments sought by appellant in the present actions was not directly prohibited or enjoined by the Act. Any action by the Commission in respect of the administrative questions, above referred to, could not therefore determine whether the payments sought were prohibited and enjoined by the provisions of the Elkins Act. The Supreme Court only contemplated that the Commission would, after investigation, determine what was a reasonable allowance to be made to a shipper furnishing the facilities and require the carriers to specify the amount of that allowance in their published tariffs and provide for the payment thereof to shipper lessees, thus removing the illegal restrictions in current tariffs against payment to shipper lessees. Of necessity these determinations would be effective in the future and it would devolve upon the Courts then to determine whether any acts upon which a complaint was based constituted a breach or departure from the orders of the Commission.

The above analysis clearly shows that the Supreme Court did not intend to take from the District Court or commit to the Interstate Commerce Commission the trial of the sole issue in these cases. It expressly held that the District Court had complete jurisdiction of the subject matter of the suit and of the parties. The Court's reference to the decision in *Mitchell Coal & Coke Co. v. Pennsylvania Rd. Co.* does not indicate such an intention on the part of the Court. The question of jurisdiction was raised in that case as it was raised by the Commission in this case and the Supreme Court merely held that the dismissal should be stayed so as to give the plaintiff therein an opportunity to apply to the Interstate Commerce Commission for an investigation, with the right to thereafter proceed with the trial of the case in the District Court and that *in which proceeding* the defendant there could then offer its defenses. That case did not purport to enlarge the jurisdiction or authority of the Interstate Commerce Commission and cannot be read as warranting the claim of appellees here that the Court intended either to clothe the Interstate Commerce Commission with the District Court's jurisdiction to decide the issue before it or to instruct the District Court to enter summary judgment without a trial of that issue. Yet that is exactly what counsel for appellees are now attempting to establish in these cases.

The Supreme Court, in *General American Tank Car Corporation v. El Dorado Terminal Company,* 308 U. S. 422, referred to in Appellees' Brief as "The First

Supreme Court Decision", held that the District Court had complete jurisdiction of the subject matter of the suit and of the parties; that the Oil Works had furnished the tank cars to the carriers and was entitled, under the plain provisions of Section 15 (13) of the Commerce Act to claim and receive the mileage allowance of one and one-half cents per mile previously approved by the Commission and set out in the published tariffs, but that since the published tariffs of the carriers provided that such payments should be made to the registered car owner and not to the shipper lessee, the Oil Works was not entitled, without change in those tariffs, to claim directly upon the railroad for the mileage.

Continuing, the Court said that the carriers were not entitled to impose such restriction in the face of the statutory provision that the shipper should receive the mileage allowance. The Court referred to a claim that the mileage allowance then being paid might in the final results enable the shipper to make a profit on the car lease agreement and obtain transportation at less than other shippers would be required to pay; and that these and other questions of an administrative character were within the competence of the Interstate Commission. In closing the Court remanded the case to the District Court to "be held pending the conclusion of an appropriate administrative proceeding". The Court's final action was premised by a statement that the record revealed an administrative problem or question within the province of the Commission. The administrative problem or question was

not, however, the admitted legal issue in the case but arose from the facts disclosed by the record that the existing railroad tariff denied to a shipper lessee the right to which such shipper was entitled under Section 15 (13) of the Commerce Act, to receive directly from the carriers the car mileage allowance for the furnishing of the tank cars and that contrary to the provisions of the Act the carriers had been paying the mileage to the car owner; also, that it might be found upon full investigation that the current rate of mileage allowance might in some instances permit the shipper to realize a profit or enjoy some advantages prohibited by the Elkins Act. The Court very clearly did not intend to divest the District Court of its jurisdiction to try the issue in the civil action pending before it, or to refer to the Commission anything more than the determination of the amount of a reasonable allowance to be paid by the carriers for the furnishing of tank cars or other facilities and for effecting such change as was necessary in regard to the payment of such mileage to accomplish conformance with the provisions of Section 15 (13) of the Commerce Act. It is obvious that if the Supreme Court intended to decide the special issue involved in the case before it (No. 11,539), it would have done so, and if it intended that the Interstate Commerce Commission should decide that issue, it would have so stated. But in pointing the difference between the jurisdictions of the Commission and the District Court, the Supreme Court very definitely held, in the language quoted at page 13 of Appellees' Brief, that

the Commission should establish the amount of the allowances and provide for an orderly payment that should not offend against the prohibitions of the Elkins Act and that there would be "remitted to the Court the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders". At the date of the Supreme Court's decision the second case (No. 11,538, before this Court) had not been heard. It involved Appellant's claims which accrued under the car-leasing contract over a period subsequent to those involved in the earlier action, No. 11,539, which was before the Supreme Court. Naturally, therefore, the record could not have disclosed anything affecting that second suit, and no issue or question presented or presentable in that case could have been referred to the Commission, as claimed by Appellees.

The use by the Supreme Court in its opinion of the term, "an appropriate administrative proceeding", indicates that the Supreme Court did not have in mind any decision by the Commission of the issue involved in the assumpsit action before the District Court but did have in mind an appropriate investigation proceeding provided for in Section 15 (13) of the Commerce Act. In such an investigation the Commission could approve the existing mileage allowance which had been in effect for years or modify it in line with the developed facts or suspend it, if it offended against the Elkins Act, by a suspension order, as was done in the *Refrigerator Car* case. This action would leave it to the Courts to determine, after such action was taken

by the Commission, whether any act of the carrier or shippers had violated such provisions. Previous payments and practices, which the Supreme Court in its later decision held to have been the subject of reference to the Commission, could not have involved a violation of such orders or regulations as the Commission might thereafter make under the Supreme Court's authority. Moreover, neither the Supreme Court nor the Commission could, without evidence, determine final economic results to the shipper lessee.

In referring to the Interstate Commerce Commission proceeding Counsel for Appellees assert that Appellant's application to the Commission sought a determination of the special issue in these cases. That claim is incorrect and wholly unwarranted. The only course open after the first decision of the Supreme Court was an application to the Commission for an investigation under the provisions of Section 15 (13) of the Interstate Commerce Act. Appellant's application was made under the authority of that Act and in consonance with the suggestion of the Supreme Court. Of necessity it referred to and in part quoted the decision of the Supreme Court. It could not alter the decision of the Court or serve to vest the Commission with any greater authority than it had under the statute. Under the provisions of Section 15 (13) of the Act the Commission was vested with authority either on application or its own initiative to determine after a full investigation what is a reasonable compensation to be allowed as a maximum to shippers who furnish facilities to the rail carriers and to cause

that rate to be published and made applicable to all shippers. The only purpose and effect of the application was to get the Commission to exercise its authority. This it could have done but did not do on its own initiative. After referring to the questions raised by the Supreme Court in its opinion, which we have previously noted, the application closed with a prayer that the Commission "make such order or orders as the Commission may consider proper in the premises". This prayer, as well as the application, must be read as limited by the provisions of Section 15 (13), supra—which was the only applicable statute. That statute gave to the Commission no authority to appropriate to itself the jurisdiction of the District Court or to decide any issue before that Court. Contrary to the apparent claim of Counsel for Appellees, the Commission could not by its order for investigation extend its authority beyond the provisions of the Act, or pass upon the validity of the car lease agreement which the Supreme Court had already held to be lawful in itself. Obviously the Commission could not exercise its investigating authority over an issue in the second case (No. 11,538), which had never been before the Supreme Court, or as to the final result on appellant's operations of payments which had not as yet been made. Extended discussion of the decision of the Commission would be purely academic.

Appellees' detached quotations from the Commission's report and their broad claims therefor must be read in the light of the fact disclosed by the report that the only payments passed upon by the Commis-

sion were those previously made by Appellees under the lease contract, which were not a subject of the present actions. The closing paragraph of the report quoted by Appellees that the Oil Works (Appellant) is entitled to no allowance from the respondent rail carrier or carriers for the special cleaning and preparation of the tank cars is wholly irrelevant. That question was not involved; no such claim had been made; and in fact the Oil Works had expressly disclaimed any right to so claim. Moreover, such a determination had no bearing on the rights of the Oil Works to claim against the Tank Car Corporation under the car lease agreement.

Appellees cavalierly assert that the Commission's order was a complete disposition of the issue before the District Court and also of the Oil Works' claim for money accruing subsequent to the filing of the first action (No. 11,539) under the car lease agreement. This is a mere assumption on the part of Appellees' Counsel. Obviously, indebtedness accruing in favor of the Oil Works long after the first action was begun was not involved in that action and any question as to the legality of such claim was not before the Supreme Court. Moreover, the Interstate Commerce Commission in its report in the *Refrigerator Car* case proceeding and the opinion of the Supreme Court quoted in part at page 12 of Appellees' Brief had held that a shipper lessee would be entitled to collect from the carrier not only the car rentals but also actual expenses in connection with the furnishing of the cars.

Appellees' reference to the Three-Judge Court proceeding merits no comment.

The second Supreme Court decision in *El Dorado Oil Works, et al. v. United States, et al.,* 328 U. S. 12, 90 L. Ed. 1053, is concerned very largely with a discussion of the decision and order of the Interstate Commerce Commission rendered practically four years after the filing of the above mentioned application. Appellant in that case had contended that the Commission was not authorized under the statute to pass upon the validity of payments made by Appellees under the car lease contract years before and for mileage earned in the years 1934 and 1935 and not involved in the present actions. In deciding against Appellant's contention, the Supreme Court held that the Commission had made its determination as to the lawfulness of those practices and payments on the basis of Appellant's own application. With due respect to the Supreme Court, Appellant's application could not have vested the Commission with an authority it did not already possess under the statute.

Continuing, the Supreme Court held that the question before it in the former case (308 U. S. 422) did not relate to the future but to past allowances and hence, that the question remitted by it to the Commission related only to the past transactions between the parties under the car lease contract. The question as to the validity of payments not yet made but claimed by Appellant under the terms of the car lease contract was not before the Court or the Commission, and therefore Appellant's right to try the issue involving

the legality of such payments, if and whenever made, under the restrictions of the Interstate Commerce Act, was not decided. That, however, is the question raised by the issue in the instant cases. This question could not be properly determined except upon a trial of the issue, inasmuch as the test as to whether an act complained of constituted a rebate or concession prohibited by the Elkins Act, must depend upon the final results as disclosed by the facts. The question would be whether in the final result a payment such as that involved in the present actions would enable a shipper to transport its commodities at rates less than the published tariffs, or to obtain and enjoy an advantage over other shippers. This is the rule announced by Mr. Justice Roberts in his opinion in the case of *General American Tank Car Corporation v. El Dorado Terminal Company,* supra, and also recognized by the decision of the same Court in the later decision of *El Dorado Oil Works v. United States,* 328 U. S. 12, 90 L. Ed. 1053. Appellant, in demanding a trial of these cases before the District Court, desired to, and was entitled to, develop all of the facts so as to show that in the final result Appellant could neither have made a profit on the car lease agreement nor received any preference whatsoever within the provisions of the Elkins Act.

In denying Appellant's request for such trial and dismissing the actions, the District Court committed an error. At page 9 of Appellant's Opening Brief, we cited to the Court's attention various decisions of the United States Supreme Court and of other Federal

Courts, which sustained our position. In substance, the holding of those cases was that where there is either an issue of fact or an issue of law concerning the sufficiency of undisputed facts, it is error for the District Court to grant summary judgment.

The question as to the final result to the Appellant of payment in the future by Appellees of monies received by them as Appellant's agent under the terms of the car lease agreement, is purely a question of fact and the determination of that question as to the effect of payments not yet made would not be determined by the decision of the Interstate Commerce Commission or even of the Court as to the result of payments previously made. In *U. S. v. Hartford Empire Co.*, 1 Fed. Rules Decisions 424 at 427, the Court denied the right of the District Court to summarily dispose of an undetermined issue in the following language:

> "The court cannot prejudge. He does not know what the testimony will disclose. He cannot anticipate facts of his own will and motion."

It is significant that opposing counsel passed these cases without discussing or mentioning them. This omission is not sufficiently answered by Appellees' attempt at repudiation of their stipulation in the District Court, that there *is* an issue in these cases. The record shows the existence of such issue and the Brief for Appellees does not disclose that the issue was ever tried by a Court. Nor do opposing counsel advance such a claim, except inferentially, that the Interstate Commerce Commission decision declared as to conditions applying to other payments of different

dates, general principles which would be applicable only if the proven facts make them so.

The final result to the shipper lessee of the payments claimed but not yet made was not tried or decided by any Court or by the Commission and was still open and undecided at the date of the pre-trial conference.

Appellees have cited *Thompson, Trustee, et al. v. Texas Mountain Railroad Co.*, 328 U. S. 134, to the point that when the Interstate Commerce Commission has acted, the Court may proceed to enter judgment in conformity with the terms and conditions specified by the Commission. We might concede that in a proper case this principle could be invoked, but it would have no force otherwise. The facts of the case make the principle inapplicable here. The case involved the right of a contracting railroad carrier to terminate a joint trackage agreement and the authority of the Court to act upon such termination, without prior action by the Interstate Commerce Commission. The jurisdiction to control such termination of a trackage agreement rested with the Commission and its decision thereon was controlling and should, therefore, be recognized and followed by the Courts. The decided case does not expressly or by implication require the entry of judgment in the District Court without a trial on an issue before it, and on no theory can have any application to the appeals before this Court. The fact that the decision in *General American Transportation Co. v. El Dorado* directed that the trial Court should stay its hand pending the conclu-

sion of an administrative proceeding before the Commission does not support the point for which counsel for Appellees cited it. It has no application whatever.

At page 13 of Appellant's Opening Brief we made the claim and cited supporting authorities that the judgments of the District Court involved on this appeal were unsupported by findings of fact and conclusions of law and should be reversed. Counsel for Appellees concede the general rule but deny its application. Their contention is that in *Perry v. Baumann,* 122 F. (2d) 409, and *Timetrust v. Securities and Exchange Comm.,* 130 F. (2d) 214, both of which were decided by this Court, the judgments were reversed because of the absence of findings upon issues which had been tried, and they seek to distinguish the decision of the Supreme Court in the case of *Mayo v. Lakeland Highlands, etc.,* 309 U. S. 310, 84 L. Ed. 774, which is also cited by Appellant, on the plea that the case was remanded to the trial Court to make findings on the disposition of a motion for preliminary injunction. In citing the last-mentioned case we stated that the action of the trial Court was upon an application for injunction and we cited the Court's decision that upon such motion the appealing party was entitled to have "explicit findings of fact upon which the conclusion of the Court was based. Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal." There would seem to be no inherent difference between a motion for judgment and an application for injunction and, therefore, no basis for a departure from the

practice pointed out by the Supreme Court in its decision in *Mayo v. Lakeland Highlands, etc.* Counsel for Appellees cite *Lindsay v. Leavy,* 149 F. (2d) 899. If this decision is to be read as contrary to the rule announced in *Mayo v. Lakeland Highlands, etc.,* supra, it is non-effective as against the Supreme Court's decision; but if the case can be distinguished from that before the Supreme Court in the *Mayo* case, so as to permit departure from the rule of that case, it must be upon the ground that the case involved a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Such motion is based upon the ground that there is no triable issue before the Court. The citation of the case by counsel for Appellees was, no doubt, prompted by their adherence to the theory advanced elsewhere in their brief that the Interstate Commerce Commission had tried and disposed of the issue in the civil action and, therefore, there was no triable issue. No motion for summary judgment under Rule 56 of the Rules was made. As before stated, it was stipulated by counsel and agreed by the Court that there was at that date an issue in the case. We have shown that it had not been tried by the Court, and the failure to so try it and to make findings is assigned as error on this appeal. From the report of the case of *Lindsay v. Leavy,* supra, it would appear that the lower Court really viewed the complaint as not stating a cause of action that could be maintained or proved at all. In other words, the case was disposed of for want of equity.

In conclusion Appellant submits:

1. That Appellees' answer to the complaint in the instant cases contained the special defense that Defendant (Appellee here) was and is expressly prohibited and enjoined by law and particularly by the provisions of the Elkins Act from paying to Plaintiff (Appellant here) the monies sought to be recovered by Plaintiff. Insofar as that defense was founded upon the express provisions of the Elkins Act, it is answered by the Act itself. Any question as to whether payment by Appellees to Appellant as provided in the car lease agreement would amount to a rebate or enable the shipper (Appellant) to transport its commodities at less than the tariff rates or enjoy a preference over other shippers presents a question of fact which, as we have pointed out in the earlier pages of this brief and as stated by the Supreme Court in the two decisions discussed, would depend upon the final result disclosed by all of the facts upon a trial of the issue. Appellant was entitled to a trial of that issue before the District Court. Such trial was denied. The District Court based its denial of trial and its order for judgment on the decisions of the Supreme Court referred to at page 45 of the record with the conclusion that there were no facts to be determined in this litigation. (R. 44.) We have shown in Appellant's Opening Brief and again at some length in this brief that neither of the decisions of the Supreme Court passed upon or determined the special issue referred to it. We have likewise shown that the decision and order of the Interstate Commerce Commission could not on

constitutional grounds, and did not actually, determine that issue. The issue was therefore untried at the date of the pre-trial conference. Appellant was entitled to such trial, and the District Court erred in denying it and ordering judgment for Appellees. This position is fully supported by the decisions cited at page 9 of Appellant's Opening Brief, as to which Appellees' counsel have offered no criticism. We submit, therefore, that the judgments should be reversed.

Dated, San Francisco, California,
August 6, 1947.

Respectfully submitted,
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No. 11,541.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARCELINO C. PINA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX

PAGE

Statement of facts 1

Factual matter pertaining to accomplice Rodriguez which does not directly appear in this record, but which is a matter of public record 2

Argument 4

A. The refusal to give defendant's proposed instruction No. 3 was not error 4

B. The denial of the motion to reopen the case was not error 6

Evidence of an intent to defraud the United States was sufficient 8

Conclusion 13

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Buckner v. Aderhold, Warden, 73 F. (2d) 255	12
Caminetti v. United States, 242 U. S. 470	5
De Maurez v. Squier, Warden, 144 F. (2d) 564; cert. den. 323 U. S. 762	12
Diggs v. United States, 220 Fed. 545	5
Grimes v. United States, 151 F. (2d) 417	5
Haas v. Henkel, 216 U. S. 462	12
Hammerschmidt v. United States, 265 U. S. 182	12
Head v. Hunter, 141 F. (2d) 449	10
Johnson v. Warden, 134 F. (2d) 166; cert. den. 319 U. S. 763	9
Meadows v. United States, 11 F. (2d) 718; cert. den. 273 U. S. 702	6
Pine v. United States, 135 F. (2d) 353; cert. den. 320 U. S. 740	5
Prussian v. United States, 282 U. S. 675	12
United States v. Goldsmith, 68 F. (2d) 7	11
United States v. Schanerman, 150 F. (2d) 941	5
United States v. Schwartz, 150 F. (2d) 627	5

STATUTES

Criminal Code, Sec. 28	8
Criminal Code, Sec. 29	8, 12
United States Code, Title 18, Sec. 72	8, 11
United States Code, Title 18, Sec. 73	8, 9
United States Code, Title 18, Sec. 922	3

TEXTBOOKS

Federal Digest, Criminal Law, Key 829(1) and (10)	5

No. 11,541.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARCELINO C. PINA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement of Facts.

Appellee takes no issue to the facts of the case as stated in Appellant's Opening Brief "Statement of the Case," however, the following additional statement may be helpful.

A government check, namely, "mustering-out pay," was sent to the payee, Felix T. Soto, "1551 E. 118 Pl., Los Angeles 2, Calif." The check was in the amount of $100.00, and was drawn on the Treasurer of the United States. This check was never received by the payee, nor did the payee authorize any person to endorse same.

The accomplice, designated in the record as Raymond T. Rodriguez (otherwise known as Raymond Gilbert Rodriguez), was but seventeen at the time the offense was committed [R. 36]. On or about December 29, 1945, the accomplice, Rodriguez, was in the home of the appellant, Pina, at which time the appellant showed him the

check in question [R. 33]. The appellant asked Rodriguez how he would like the idea of cashing the check [R. 33 and 34]. At first, the accomplice, Rodriguez, did not care to do so, but was persuaded in doing so.

The accomplice, Rodriguez, and the appellant, Pina, then drove in the appellant Pina's car to a check-cashing establishment in Watts, California, which place the defendant had told Rodriguez about. Rodriguez, alone, entered the check-cashing place and there cashed the government check [R. 34, 35]. Rodriguez returned to the car and gave the full $100.00 to Pina, less a service charge of twenty cents made for cashing the check, and received $20.00 from Pina, the appellant Pina keeping the remainder of the money [R. 35 and 39].

The appellant Pina had given a statement to U. S. Secret Service Agent Prescott H. Manning [R. 40-44]. The statement was given on November 24, 1946. According to the testimony of Agent Manning, the appellant Pina admitted his complicity with the accomplice Rodriguez, in securing and cashing this check.

According to the defense witness, Sally Arias, who was more than a close friend of Pina, she, Sally Arias, endorsed or signed the check at the request of Rodriguez [R. 48].

NOTE:

Factual Matter Pertaining to Accomplice Rodriguez Which Does Not Directly Appear in This Record, But Which Is a Matter of Public Record.

The trial took place on January 22, 1947. The date is only material to this case as it bears reference to the accomplice Rodriguez's previous plea and sentence in case

United States v. Rodriguez, No. 19095, which occurred in the same district and division as the trial of this case. While the charge against Rodriguez is not a part of this record, it undoubtedly was known to defendant's counsel and was a matter of public record.

Appellant has referred to the case against Rodriguez, hence appellee deems it proper to do likewise.

The files in the District Clerk's office reveal that the accomplice Rodriguez had, on December 23, 1946, been charged in an Information as a juvenile delinquent with having uttered this same check, pursuant to 18 U. S. C. A., Section 922. The file and record reveal that Rodriguez consented to being prosecuted as a juvenile delinquent, and entered a plea of guilty on December 23, 1946. On January 13, 1947, Rodriguez was sentenced for his complicity. Rodriguez was placed on probation until he reaches the age of twenty-one, one of the conditions being that he make full restitution. The sentence of the accomplice Rodriguez preceded this trial by nine days.

That appellant's counsel was aware of the charge against Rodriguez is at least impliedly borne out by the cross-examination of Rodriguez. This question by defendant's counsel and answer by the accomplice Rodriguez appear in the record [R. 40]:

> "Q. Have you pleaded guilty to the crime of uttering this forged check? A. Yes, sir; I pleaded guilty for my part."

ARGUMENT.

I.

On page 5 of appellant's opening brief, appellant asserts (a) that he was prejudiced by the court's refusal to give his instruction No. 3, pertaining to accomplices, and (b) that the denial of his motion to reopen the case constituted error.

A. The Refusal to Give Defendant's Proposed Instruction No. 3 Was Not Error.

It should be observed that the court gave an instruction defining an accomplice, which included the admonition

> "* * * that such testimony is to be weighed and scrutinized with great care, and that, if it is not corroborated by other competent evidence, it should not be relied upon * * *" [R. 68].

The court also gave what may be termed a standard instruction concering the credibility of witnesses, particularly as follows [R. 71]:

> "* * * You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the government or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his or her credibility."

It is, of course, better practice—and one which we believe was followed in this case—to caution the jury concerning the testimony of an accomplice and of the danger of convicting without supporting evidence.

The courts, however, have held that even the failure to give such a precautionary instruction is not reversible error. That a refusal to give such an instruction is generally discretionary, is supported by the following:

Pine v. United States, 135 F. (2d) 353, at p. 355 (C. C. A. 5th), cert. den. 320 U. S. 740.

The Supreme Court, in affirming an opinion in this circuit, has held that while it is better practice to give such an instruction, that the refusal is not error. See:

Caminetti v. United States, 242 U. S. 470, at p. 495 (aff. *Diggs v. United States,* 220 Fed. 545 [C. C. A. 9th]).

That an instruction somewhat similar to the one given by the trial court is all that is required, see the following:

United States v. Schwartz, 150 F. (2d) 627 (C. C. A. 2d);

United States v. Schanerman, 150 F. (2d) 941 (C. C. A. 3rd).

Upon the proposition that no special instruction need be given when the matter is covered by the general instructions, see:

Grimes v. United States, 151 F. (2d) 417 (C. C. A. 5th);

United States v. Schanerman (supra).

See, also, cases noted in:

Federal Digest, Criminal Law Key 829(1) and (10).

This circuit has held in *Meadows v. United States,* in a case pertaining to a charge of forging assignments on Liberty Bonds and uttering same, that the refusal to give accused's requested instructions relating to the credibility of an accomplice's testimony was not error when the matter was fully covered by the charge given.

> *Meadows v. United States,* 11 F. (2d) 718 (C. C. A. 9th); cert. den. 273 U. S. 702.

B. The Denial of the Motion to Reopen the Case Was Not Error.

Commencing on page 5 of Appellant's Opening Brief, he contends that the case should have been reopened so that he might have shown that the accomplice Rodriguez had been placed on probation.

Upon cross-examination, appellant's counsel asked Rodriguez [R. 40]:

> "Q. Have you pleaded guilty to the crime of uttering this forged check?"

to which Rodriguez replied:

> "A. Yes, sir, I pleaded guilty for my part."

Such inquiry presupposes knowledge of the pendency of the like charge against Rodriguez. Counsel did not pursue the matter; although no objection was interposed, he was not restricted. Counsel could have readily made further inquiry, had he seen fit, in an attempt to exhibit motive or bias on the part of the witness Rodriguez.

The sentence imposed on the accomplice Rodriguez, as a juvenile delinquent, was imposed January 13, 1947, or nine days prior to the trial of the instant case. The file and record of that case is and was a public record. (*United States v. Rodriguez,* No. 19095.)

It is submitted that Rodriquez's complicity and admission of joint guilt was clearly brought to the jury's attention.

It should be noted that this motion to reopen the case was not made until after argument [R. 61 and 62].

Appellee submits that the matter of punishment or probation granted with reference to Rodriguez was, at that stage of the proceedings, immaterial. At the trial, no inducement stood over Rodriguez to have motivated him to have testified favorably for the government. His case was closed, he had been placed on probation.

The court's ruling was one entirely within his discretion.

II.

Evidence of an Intent to Defraud the United States Was Sufficient.

Answering appellant's contention commencing on page 6 (Opening Brief), designated under heading "II," appellant contends that the evidence of an intent to defraud the United States was insufficient. It is to be noted that the indictment charges the check was uttered "with intent to defraud the United States" [R. 4].

Appellant appears to argue that the government must sustain some pecuniary loss. The authorities are adverse to appellant's contention.

We have read all the cases cited by appellant and submit that they are not controlling, if even to point as to this charge.

Before discussing the authorities, we call attention that in addition to the statute under which this indictment was brought, namely, 18 U. S. C. A., Section 73, there is also the companion section of 18 U. S. C. A., Section 72.

For all practical purposes, these companion sections are substantially alike so far as the instant charge is concerned: they both denounce the uttering as true, or causing to be uttered as true, of certain described forged instruments and "other writings," with the intent to defraud the United States. The opinions often refer to both sections and draw parallel conclusions.

18 U. S. C. A., Section 72, is also known as Section 28 of the Criminal Code; 18 U. S. C. A., Section 73, is also known as Section 29 of the Criminal Code.

This circuit held (June, 1943) that a forged physician's prescription for narcotics would fall within the meaning

of the phrase "other writings," and further held that in uttering such a forged writing, it is not necessary to prove that the government would thereby suffer a pecuniary loss. In the material quoted hereunder, this court also refers to the companion section under which this indictment was brought, namely, 18 U. S. C. A., Section 73.

Johnson v. Warden, 134 F. (2d) 166 (C. C. A. 9th); cert. den. 319 U. S. 763.

"Section 28 of the Criminal Code makes it an offense for any person to 'utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any * * * false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States * * *.' We entertain no doubt that a forged physician's prescription for narcotics falls within the meaning of the phrase 'other writing' as used in that statute. It was said in Prussian v. United States, 282 U. S. 675, 51 S. Ct. 223, 75 L. Ed. 610, that the words 'other writing' as used in a companion statute, §29 of the Criminal Code, 18 U. S. C. A., §73, were included for the purpose of extending the penal provisions of the statute to all writings of every class if forged for the purpose of defrauding the United States.

"It is well settled that in order to establish a purpose to defraud the United States, within the contemplation of §28 of the Criminal Code, it is not necessary to prove that the government would thereby suffer a pecuniary loss. It is enough that the unlawful activity be engaged in for the purpose of frustrating the administration of a statute, or that

it tends to impair a governmental function. By 26 U. S. C. A., Internal Revenue Code, §2554, it is made unlawful for any person to sell or give away any narcotic drugs except in named circumstances, one of which is upon prescription issued by a registered physician, dentist, or veterinary surgeon. It is obvious that the utterance of a forged prescription tends directly to frustrate the laws of the United States relating to the dispensing of narcotics."

In the case of *Head v. Hunter,* hereunder noted, the appellant, an Indian, and a codefendant were indicted for changing the name of a certain designated person in a permit. The permit was issued by an authorized official of the government and authorized a named person to sell one Hereford cowhide. The court held that the indictment did not fail to charge a crime on the theory that the intent was to defraud a private citizen.

Head v. Hunter, 141 F. (2d) 449, at p. 451 (C. C. A. 10th).

"It is further contended that the forging or altering of the permit, as set forth in the indictment, did not encompass a purpose to defraud the United States, which is an essential ingredient of the statutory offense. Rather it is argued that it was not the intention of the parties to defraud the United States of any money or property, but to defraud a private citizen. It is true that the indictment does not charge the United States suffered a pecuniary loss, but a pecuniary loss to the government is not prerequisite to the crime of defrauding the United States. It is enough if the acts charged frustrate the administration of a statute or tend to impair or impede a governmental function. Cross v. North Carolina, *supra*; Hammerschmidt v. United States, 265 U. S. 182, 44 S. Ct. 511, 68 L. Ed. 968; United States

v. Tynan, *supra;* Falter v. United States, 2 Cir., 23 F. 2d 420; Miller v. United States, 2 Cir., 24 F. 2d 353; Goldsmith v. United States, 2 Cir., 42 F. 2d 133; United States v. Goldsmith, 2 Cir., 68 F. 2d 5; Johnson v. Warden, *supra.* The permit described in the indictment was an instrument issued by an official of the United States Government in the performance of his official duties and it is charged that this instrument was forged, altered and changed for the purpose of defrauding the United States. It follows that if a statute of the United States was thereby frustrated, or a governmental function impeded or impaired, the requirements of the criminal statute are satisfied. The appellant entered a plea of guilty and any questions of fact are thereby foreclosed."

With respect to a charge of defrauding the United States by uttering a forged writing, predicated under 18 U. S. C., Section 72, which writing purported to be an Internal Revenue Collector's authorized receipt for payment of taxes, the court, in

United States v. Goldsmith, 68 F. (2d) 5, at p. 7 (C. C. A. 2d)

stated as follows:

"* * * It is true that the acts complained of could not defraud the United States in the sense of resulting in a pecuniary loss to it. No money belonging to the United States was taken from it, nor was it deprived of the right to collect the tax which was due. But it is clearly established that, to defraud the United States, pecuniary loss is not necessary; any impairment of the administration of its governmental functions will suffice. Hass v. Henkel, 216 U. S. 462, 480, 30 S. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; United States v. Plyler, 222 U. S. 15, 32

S. Ct. 6, 56 L. Ed. 70; Goldsmith v. United States, 42 F. (2d) 133 (C. C. A. 2); United States v. Tynan, 6 F. (2d) 668 (D. C. S. D. N. Y.); Curley v. United States, 130 F. 1 (C. C. A. 1). An intent to defraud the United States in the exercise of its governmental powers is alleged. We cannot say that the forged receipt could not possibly operate to the prejudice of the United States in respect to collection of the tax. It was in a form and on paper officially printed."

In the case of

Prussian v. United States, 282 U. S. 675,

the Supreme Court held (pp. 679-80), in construing Section 29 of the Criminal Code, that an indictment charging a forgery of an endorsement on a government draft, for the purpose of obtaining and receiving money from an officer of the United States, on whom it was drawn, need not allege an intent to defraud the United States. The court further held that such a charge "imports an intent to defraud the United States."

Additional cases upon the broad proposition that no pecuniary loss need be sustained by the government, are the often cited cases noted below:

Haas v. Henkel, 216 U. S. 462, at p. 479;

Hammerschmidt v. United States, 265 U. S. 182, at p. 188.

That a government check, the forging of the endorsement and uttering thereof, is covered by the statute, see:

De Maurez v. Squier, Warden, 144 F. (2d) 564 (C. C. A. 9th), cert. den. 323 U. S. 762;

Buckner v. Aderhold, Warden, 73 F. (2d) 255 (C. C. A. 5th).

Conclusion.

It is therefore respectfully submitted that the verdict and judgment of conviction should be affirmed.

JAMES M. CARTER,
United States Attorney,

ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief of Criminal Division,

Attorneys for Appellee.

No. 11542

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

OREGON CITY WOOLEN MILLS, a corporation and C. L. KELLY, manager of the Portland, Oregon store,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 870 Brannan Street, San Francisco 5-26-47—60

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Rotary Colorprint, 870 Brannan Street, San Francisco 5-20-47—60

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Appeal:

Notice of 6

Certificate of Clerk (DC) 11

Designation of Record 10, 17

Information 2

Motion for Dismissal 5

Motion for Order Extending Time 7

Names and Addresses of Attorneys of Record .. 1

Notice of Appeal 6

Order Extending Time 9

Order of Dismissal 5

Proceedings 13

Reporter's Certificate 16

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For Appellees.

In the United States District Court
for the District of Oregon

No. C-16868

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON CITY WOOLEN MILLS, a corporation, and C. L. KELLY, manager of the Portland, Oregon, store,

Defendants.

INFORMATION

Violation of Emergency Price Control Act of 1942, as Amended, 421 77th Cong. 2nd Sess. 56 Stat. 23 50 U.S.C.A., and Maximum Price Regulation 580, as amended, Section 18(d), 10 FR 3015 and 3642

Be It Remembered That J. Robert Patterson, Assistant to the Attorney of the United States for the District of Oregon, who prosecutes in behalf and with the authority of the United States, comes here in person into court at this March term thereof, and for the United States gives the court to understand and be informed that:

Count I.

That heretofore and on or about the 17th day of June 1946, in the City of Portland, County of Multnomah, State of Oregon, and within the jurisdiction of the United States District Court for the said

District of Oregon, the defendants then and there being did then and there knowingly, wilfully and unlawfully, and with the intent and design to violate the Emergency Price Control Act of 1942, as amended, and Maximum Price Regulation 580, as amended, 10 Fed. Reg. 3015 and 3642, promulgated thereunder, did then and there violate Section 18(d) of Maximum Price Regulation 580, that is to say:

That at said time and place, said defendants sold and delivered to one Margaret Fleming a pair of men's slacks and at said time and place compelled the said Margaret Fleming to purchase a man's jacket as a consideration for the sale and delivery to the said Margaret Fleming of said men's slacks, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States of America. [1*]

Count II.

That heretofore and on or about the 19th day of June, 1946, in the City of Portland, County of Multnomah, State of Oregon, and within the jurisdiction of the United States District Court for the said District of Oregon, the defendants then and there being did then and there knowingly, wilfully and unlawfully, and with the intent and design to violate the Emergency Price Control Act of 1942, as amended, and Maximum Price Regulation 580, as amended, 10 Fed. Reg. 3015 and 3642, promulgated thereunder, did then and there violate Section 18(d) of Maximum Price Regulation 580, that is to say:

* Page numbering appearing at foot of page of original certified Transcript of Record.

That at said time and place, said defendants sold and delivered to one R. C. Thorington a pair of men's slacks and at said time and place compelled the said R. C. Thorington to purchase a man's jacket as a consideration for the sale and delivery to the said R. C. Thorington of said men's slacks, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States of America.

Whereupon, the United States Attorney for the District aforesaid, prays the consideration of this court here in the premises, and that due process of law may be awarded against the said Oregon City Woolen Mills, a corporation, and C. L. Kelly, Manager of Portland, Oregon, store, defendants in this behalf, to make their answer to the United States touching and concerning the premises.

Dated at Portland, Oregon, this 28th day of June A. D., 1946.

/s/ HENRY L. HESS,
United States Attorney for the
District of Oregon,
By /s/ J. ROBERT PATTERSON,
Deputy United States Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant to the United States Attorney for the District of Oregon, being

sworn, do say that the foregoing information is true, as I verily believe.

/s/ J. ROBERT PATTERSON.

[Endorsed]: Filed June 28, 1946. [3]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL

Comes now A. B. Winfree, Attorney for the above named defendants, and moves the Court for an Order dismissing the above and foregoing information for the reason that said information does not state facts sufficient to constitute an offense against the laws of the United States.

Dated this 8th day of January, 1947.

/s/ A. B. WINFREE,
Attorney for Defendants.

[Endorsed]: Filed Jan. 9, 1947. [4]

[Title of District Court and Cause.]

ORDER OF DISMISSAL

This cause coming on upon the motion of attorney for defendants for an order of dismissal, and the Court being advised with reference to the law and the facts in the premises, and finding that said motion is well taken, it is therefore hereby

Considered, Ordered, and Adjudged that said information be and the same is hereby dismissed.

Dated this 9th day of January, 1947.

/s/ CLAUDE McCOLLOCH.

[Endorsed]: Filed Jan. 9, 1947. [5]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Please take notice that the United States of America appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain Order and Judgment made, rendered and entered in the above-entitled cause on the 9th day of January, 1947, by the Honorable Claude McColloch, Judge of the above-entitled Court, wherein the Court dismissed an information for the reason and upon the ground that the information failed to state facts sufficient to constitute a crime under the laws of the United States. The information filed and returned on the 28th day of June 1946 alleged an offense based upon two counts in violation of Maximum Price Regulations No. 580 as amended (10 Fed. Register 3015 and 3642) issued pursuant to the provisions of the Emergency Price Control Act of 1942 as amended and extended (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat., C. 26, 50 U.S.C.A. Appx. 212, Pub. L. 383, 78th Cong., 2d Sess. 57 Stat., 566 Pub. L. 108, 79th Cong., 1st Sess., C. 214), in that the defendant sold a certain article of clothing and as a condition of

the sale compelled the purchasers as a condition for the sale of the first article to buy and purchase a second article, that is, a "tie in" sale.

Dated at Portland, Oregon this 8th day of February, 1947.

HENRY L. HESS,
United States Attorney for the
District of Oregon,
J. ROBERT PATTERSON,
Assistant United States Attorney.

[Endorsed]: Filed Feb. 8, 1947. [6]

[Title of District Court and Cause.]

MOTION

Comes now Henry L. Hess, United States Attorney and Victor E. Harr, Assistant United States Attorney, and based upon attached affidavit moves the Court for an order extending the time for the filing of the designation of record and docketing the action of appeal granting to Appellant 90 days from the first date of Notice of Appeal. This motion is made pursuant to Rule 39(c), Rules of Criminal Procedure.

Dated at Portland, Oregon this 18th day of March, 1947.

HENRY L. HESS,
United States Attorney for the
District of Oregon,
/s/ VICTOR E. HARR,
Assistant United States Attorney.

United States of America,
District of Oregon—ss.

Due and legal service of the within Motion is hereby accepted within the State and District of Oregon, on the 18th day of March, 1947 by receiving a copy thereof duly certified to as true and correct copy of the original by Victor E. Harr, Assistant United States Attorney for the District of Oregon.

/s/ A. B. WINFREE, J.A.
Attorney for Defendant.

State of Oregon,
County of Multnomah—ss.

I, Victor E. Harr, being first duly sworn, depose and say that I am Assistant United States Attorney for the District of Oregon, that the case of the United States vs. Oregon City Woolen Mills, Criminal Number 16868 was being handled by Assistant United States Attorney, J. Robert Patterson, who is presently away from the office for a period of time; that said cause has been reassigned to me during the absence of J. Robert Patterson; that a Notice of Appeal was duly filed in this cause on February 8, 1947; that I myself have been away from the office for a period of ten days because of a death in my family and since my return on March 8, 1947 I have been unable to give the within cause the necessary attention, or any attention at all in the preparation and docketing of the record herein; that it is my intention to submit certain matters with relation to this case to the Attorney General for considera-

tion before filing the designation of record. This Affidavit is made in support of a motion for an extension of time within which to file the designation of record.

Dated at Portland, Oregon this 18th day of March, 1947.

/s/ VICTOR E. HARR,
Assistant United States Attorney.

Subscribed and sworn to before me this 18th day of March, 1947.

[Seal] LINUS M. FULLER,
Notary Public for Oregon.

My commission expires Jan 26, 1951.

[Endorsed]: Filed March 19, 1947. [8]

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard this date upon motion of Plaintiff-Appellant through its attorney, Henry L. Hess, United States Attorney for the District of Oregon and Victor E. Harr, Assistant United States Attorney for an order extending time for filing record and docketing the appeal, and the filing of designation of record, and it appearing to the Court, the examination of affidavit of Victor E. Harr on file herein, that good cause has been shown therefore and the Court being fully advised in the premises;

It Is Ordered that the time for filing of the record and docketing of appeal and the filing of designation of record be and it is hereby extended to 90 days from the date of the first Notice of Appeal.

Made and entered at Portland, Oregon this 19th day of March, 1947.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed March 19, 1947. [9]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The United States, by its attorney, Henry L. Hess, United States Attorney for the District of Oregon, designates for inclusion in the transcript of Record to be certified by the Clerk of the United States District Court for the District of Oregon and to be filed in the Circuit Court of Appeals for the Ninth Circuit, pursuant to appeal in the above-entitled cause, the following documents:

1. Information.
2. Motion to Dismiss.
3. Transcript of Proceedings before the Honorable Claude McColloch on January 7, 1947, including argument, statement and rulings by the court.
4. Order dismissing Information entered.
5. Notice of Appeal.
6. Order of March 19, 1947 allowing an addi-

tional ninety days within which to docket and file record on appeal.

7. This Designation of Record.

/s/ HENRY L. HESS,
United States Attorney for the
District of Oregon. [10]

United States of America,
District of Oregon—ss.

I, Victor E. Harr, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Designation of Record on the Appellee herein, by depositing in the United States Post Office at Portland, Oregon on the 22nd day of April, 1947, a duly certified copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to A. B. Winfree, Attorney at Law, Spalding Building, Portland, Oregon, Attorney for Appellee.

/s/ VICTOR E. HARR,
Assistant United States Attorney.

[Endorsed]: Filed April 22, 1947. [11]

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered

from 1 to 12 inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered C-16868, in which United States of America is plaintiff and appellant and Oregon City Woolen Mills, a corporation, and C. L. Kelly, manager of the Portland, Oregon, store are defendants and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate copy of Transcript of Proceedings dated Jan. 7, 1947.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 1st day of May, 1947.

[Seal] LOWELL MUNDORFF,
Clerk,

By /s/ F. L. BUCK,
Chief Deputy. [12]

[Title of District Court and Cause.]
(And Other Cases)

Portland Oregon, January 7, 1947

Before: Honorable Claude McColloch, Judge.

Appearances:

Mr. J. Robert Patterson, Assistant United States Attorney, appearing for the Government;

Mr. Alfred T. Sulmonetti, appearing for the Defendant Clarke T. Wheelbarger;

Mr. Francis F. Yunker, appearing for the Defendant Irva Rambeau;

Mr. W. J. Prendergast, Jr., appearing for the Defendant S. J. Lewin;

Mr. Wyatt Williams, appearing for the Defendant Robert Evans;

Mr. Reese Wingard, appearing for the Defendant Vadrian O. Hayes;

Mr. Thomas H. Tongue, appearing for the Defendant Sidney D. Wagner;

Mr. Harry G. Hoy, representing H. V. Johnson, Attorney for Defendant Royce Cornell, alias Roy Cornwell;

Mr. A. B. Winfree, appearing for the Defendant Oregon City Woolen Mills.

PROCEEDINGS

The Court: There are eight OPA criminal cases for arraignment this morning. Will the lawers and the defendants all come to the front of the courtroom.

In this case of the Government against Hayes, who is for the defendant?

Mr. Wingard: I represent the defendant.

The Court: United States against Wagner, who is for the defendant?

Mr. Tongue: I am, your Honor. I have a motion to dismiss that case, your Honor.

The Court: Yes. Wheelbarger?

Mr. Sulmonetti: I represent the defendant, your Honor.

The Court: Evans?

Mr. Williams: Wyatt Williams, your Honor.

The Court: Lewin?

Mr. Prendergast: I represent the defendant.

The Court: Are the defendants all here? Is there any attorney here who does not have his client with him? (No [2*] response.)

Mr. Hoy: I am here on behalf of H. V. Johnson who represents the defendant Cornwell.

The Court: Yes.

Mr. Hoy: Mr. H. V. Johnson of Eugene.

The Court: Yes.

Mr. Hoy: We have a motion to dismiss.

The Court: Yes. Oregon City Woolen Mills?

Mr. Winfree: I represent the defendant.

The Court: Is the company represented by a corporate officer?

Mr. Winfree: I am an officer of the corporation as well as its attorney. We do not want to plead individually at the present time.

*** Page numbering appearing at top of page of original Reporter's Transcript.**

The Court: I remember when you used to be a prosecutor, but I never expected to see you here as a defendant.

Mr. Winfree: Will your Honor take a plea individually at this time?

The Court: In just a few minutes. Rambeau?

Mr. Yunker: I represent that defendant, your Honor.

The Court: These are all OPA cases, are they not? They are either on indictment or information for violations of the Price Control Act, or for violations of OPA regulations. That is correct? If it is not, you tell me.

I told our Grand Jury yesterday that in my opinion [3] no valid indictment or information could be returned under OPA regulations after the date of the expiration of the law, which was June 30, 1946. I do not mean for cases occurring after July 25th but I mean that unless there was an indictment or information pending, having been returned and filed with the Court on or before June 30, 1946, that in my opinion no valid indictment could be returned or filed. All of these were returned after that date, were they not?

Mr. Sulmonetti: The Wheelbarger case was returned prior—no. That date is June 30th, your Honor?

The Court: Do you have a copy of it with you?

Mr. Sulmonetti: No, your Honor. I did not bring it with me. I think Mr. Patterson has that.

The Court: This was returned September 16, 1946. I do not think there were any exceptions.

That being so, to be consistent with the directions which I gave the Grand Jury yesterday not to return any more indictments, because of the view that I entertained, in all of these present proceedings where motions to dismiss have been filed the motions are allowed, the indictments are dismissed, the defendants discharged from custody and bail exonerated.

In cases where motions have not been filed, such motions will be entertained. They should be filed in writing. It will not be necessary for either counsel or the [4] defendants to come here. Meanwhile, bail in those cases will be continued.

Mr. Williams: I also have an order for exonerating the bond.

The Court: Yes.

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Court Reporter, hereby certify that on, to-wit, January 7, 1947, I reported in shorthand certain proceedings had in the above entitled cause and court; that I thereafter caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of pages numbered 1 to 5, inclusive, constitutes a true, full and accurate transcript of said shorthand notes, so taken by me as aforesaid.

Dated at Portland, Oregon, this 13th day of March, A. D. 1947.

/s/ IRA G. HOLCOMB,
Court Reporter. [5]

[Endorsed]: No. 11542. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Oregon City Woolen Mills, a corporation and C. L. Kelly, manager of the Portland, Oregon, store, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed May 3, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11542

UNITED STATES OF AMERICA,
Appellant,

vs.

OREGON CITY WOOLEN MILLS, a corporation, and C. L. KELLY, Manager of the Portland, Oregon, store,
Appellee.

DESIGNATION OF RECORD

Appellant respectfully designates for printing the whole and entire record as particularly itemized in Appellant's Designation of Record to the District

Court to be forwarded to the United States Circuit Court of Appeals, Ninth Circuit, it being the Appellant's intention to designate the whole and entire record on appeal, namely:

1. Information.
2. Motion to Dismiss.
3. Transcript of Proceedings before the Honorable Claude McColloch on January 7, 1947, including argument, statement and rulings by the Court.
4. Order dismissing Information entered.
5. Notice of Appeal.
6. Order of March 19, 1947 allowing an additional ninety days within which to docket and file record on appeal.
7. This Designation of Record.

Dated at Portland, Oregon this 25th day of April, 1947.

/s/ HENRY L. HESS,
United States Attorney for the
District of Oregon.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 28, 1947.

No. 11,544.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MILTON R. BROWN,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, partners doing business in the partnership name, Sunbeam Furniture Company,

Appellees.

BRIEF FOR APPELLANT.

JAMES M. CARTER,
United States Attorney;
RONALD WALKER,
Assistant United States Attorney;
JAMES C. R. MCCALL, JR.,
Assistant United States Attorney,
United States Postoffice and Courthouse Bldg., Los Angeles (12),
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

PAGE

Jurisdictional statement 1

Statutes involved 2

Rulings of the District Court 4

Questions involved 6

Statement of the case 7

The pleadings 7

The evidence 13

1. Employment relationship 19

2. "Similarity of Territories" 21

Findings of fact, judgment and appeal 26

Specification of errors 26

Argument 28

Summary 28

1. Appellant had a "Position in the Employ" of appellees 29

2. "Position of Like Seniority, Status and Pay" 33

3. "Loss of Wages or Benefits"; proper measure therefor 39

Conclusion 44

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Anderson v. Schouweiler, 63 F. Supp. 802	31
Boston & Maine Railroad v. Bentubo, 160 F. (2d) 326	39, 40
Brach & Son v. Stewart, 104 So. 162, 41 A. L. R., p. 1172; pp. 1178-1184, note	40
Claremont Country Club v. Industrial Accident Comm., 174 Cal. 391, 163 Pac. 209	32
Clark v. Housing Authority, 171 P. (2d) 217	31
Dobbs v. Williams, 68 F. Supp. 995	31
Erskine v. Marchant, 37 Cal. App. 590, 174 Pac. 74	40
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 960	29
Hanebuth v. Patton, 170 P. (2d) 526	31
Hovey v. Grier, 324 Mo. 634, 23 S. W. (2d) 1058	35
Howard v. Daly, 64 N. Y. 362, 19 Am. Stat. Rep. 285	42
Kay v. General Cable Corp., 144 F. (2d) 653	29, 30, 31
Lee v. Remington Rand, Inc., 68 F. Supp. 837	31, 32
Levine v. Berman, 7 C. C. A. (May 6, 1947)	28, 29, 32 34, 36, 37
MacMillan v. Montecito Country Club, 65 F. Supp. 240	29, 31, 32
McMullen v. Dickinson, 60 Minn. 156, 62 N. W. 120, 51 Am. State Rep. 511	42
Mihelich v. Woolworth Co., 69 F. Supp. 497	36
National Labor Relations Board v. Carlisle Lumber Co., 99 F. (2d) 533; cert. den. 306 U. S. 646, 83 L. Ed. 1045, 59 S. Ct. 586	40
Phillips v. Larrabee, 32 Cal. App. (2d) 720, 90 Pac. 820	32
Ryan v. Farrell, 208 Cal. 200, 280 Pac. 945	32
Salter v. Becker Roofing Co., 65 F. Supp. 633	31, 36
Schiffman v. Peerless Motor Car Co., 13 Cal. App. 600, 110 Pac. 460	40

PAGE

Stanley v. Wimbish, 154 F. (2d) 773.....31, 36

Smythe Sales Inc. v. Petroleum Heat & Power Co., 128 F. (2d) 697 40

Thompson's Estate, 126 Misc. 91, 213 N. Y. Supp. 426..... 35

Walker's Estate, In re, 53 N. Y. Supp. (2d) 106..... 35

Whitver v. Aalf-Baker Mfg. Co., 67 F. Supp. 524.....29, 32, 36

Yaguda v. Motion Picture Publications, Inc., 140 Cal. App. 195, 35 P. (2d) 162..... 40

STATUTES

California Labor Code, Sec. 3353 31

Judicial Code, Sec. 128(a)-First (28 U. S. Code, Sec. 225(a)-First) 1

Selective Training and Service Act of 1940, Sec. 8(b).....4, 5, 26

Selective Training and Service Act of 1940, Sec. 8(c).....2, 34

Selective Training and Service Act of 1940, as amended, Sec. 8(e) (50 U. S. C. A., App., Sec. 308(e)).....1, 27

Selective Training and Service Act of 1940, as amended, Sec. 16(b) (50 U. S. C. A., App., Sec. 316(b); 54 Stat. 897, 59 Stat. 166, and 60 Stat. 181, 342)..... 2

Selective Training and Service Act of 1940, as amended (50 U. S. C. A., App. Sec. 308; 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, and 60 Stat. 301, 341).....1, 2, 28, 34

Service Extension Act of 1941, as amended, Sec. 7 (50 U. S. C. A., App., Sec. 357; 55 Stat. 627, 58 Stat. 799, and Act of Aug. 6, 1946, Chap. 936, 60 Stat. .....) 2

United States Code, Title 29, Sec. 160(c)..... 39

TEXTBOOKS

2 American Jurisprudence, p. 241..... 40

8 American Law Reports, p. 338, anno..... 41

8 American Law Reports, pp. 347-349, anno..... 42

PAGE

Black's Law Dictionary (3d Ed.), pp. 657-658 31
16 California Jurisprudence, pp. 958-959 32
31 Corpus Juris, pp. 473-475 31
39 Corpus Juris, p. 1315 31
25 Corpus Juris Secundum, pp. 580-582 31
45 Corpus Juris Secundum, pp. 638-641 31
Handbook—Veterans Assistance Program, Sec. 301.7 34
5 Lawyers' Reports, Annotated (N. S.), p. 453 41
Restatement of the Law of Agency, Secs. 2, 220, 236 31
Webtser's New International Dictionary 31

No. 11,544.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MILTON R. BROWN,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, partners doing business in the partnership name, Sunbeam Furniture Company,

Appellees.

BRIEF FOR APPELLANT.

Jurisdiction.

Claiming to be entitled to the benefits of Section 8 of the Selective Training and Service Act of 1940, as amended, appellant Milton R. Brown, a veteran of the armed forces, brought this suit for reemployment and compensation for loss of wages and benefits, against his former employers, appellees M. R. Luster and A. M. Luster, in the District Court of the United States for the Southern District of California.

The District Court denied his petition, and the veteran appeals.

Jurisdiction of the District Court was based on Section 8(e) of the Act aforesaid [50 U. S. C. A., App., Sec. 308(e)].

Jurisdiction of this Court over the appeal rests on Judicial Code, Sec. 128(a)-First [28 U. S. Code, Sec. 225(a)-First].

Statutes Involved.

The statutes involved include:

Section 8 of the Selective Training and Service Act of 1940, as amended [50 U. S. C. A., App. Sec. 308; 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, and 60 Stat. 301, 341];

Section 16(b) of said Act, as amended [50 U. S. C. A., App. Sec. 316 (b); 54 Stat. 897, 59 Stat. 166, and 60 Stat. 181, 342]; and

Section 7 of the Service Extension Act of 1941, as amended [50 U. S. C. A., App. Sec. 357; 55 Stat. 627, 58 Stat. 799, and Act of Aug. 6, 1946, Chap. 936, 60 Stat. .....].

The reemployment benefits of Section 8, *supra,* were extended by the Service Extension Act of 1941 to "any person who shall have entered upon active military or naval service in the land or naval forces of the United States" between May 1, 1940 and the end of the war. Said Section 8, *supra,* was saved from expiration on March 31, 1947, the day other sections of the Selective Training and Service Act expired, by an amendment to Section 16(b), *supra,* which amendment prolongs the life of Section 8 indefinitely.

The particular statutory language necessary to be construed and applied in this case appears in Section 8(b, c, e) of the Selective Training and Service Act as follows:

> "(b) In the case of any such person who, in order to perform such training and service, has left or

leaves a *position,* other than a temporary position, *in the employ of any employer* * * *

> "(B) If such position was in the employ of a private employer, *such employer shall restore such person to such position or to a position of like seniority, status and pay* unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *"

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence* during his period of training and service in the land or naval forces . . . and shall not be discharged from such position without cause within one year after such restoration.

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the District Court of the United States for the district in which such private employer maintains a place of business, shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to *specifically require* such employer *to comply with such provisions,* and, as an incident thereto, *to compensate such person for any loss of wages or benefits* suffered by reason of such employer's *unlawful* action. * * *" (Emphasis supplied.)

Rulings of the District Court.

The undisputed facts include the following:

Appellees are wholesale furniture jobbers, and maintain a place of business at Los Angeles, California. Appellant was employed by the appellees as a traveling salesman, on commission, with an exclusive sales territory until February 26, 1943, when he left such employment in order to enter upon military service. On his departure, it was agreed between the appellant, the appellees and Ben Harris, the salesman who suceeded him therein, that upon his return from military service, appellant would be restored to his former sales territory. [R. pp. 69-71.] On his return, he immediately applied on March 9, 1946, for restoration thereto and was refused, although it was neither then nor thereafter, impossible or unreasonable for the appellees to restore him to said territory. [R. pp. 5, 36, 84.] In lieu of his former territory, the appellees offered to employ him as their salesman in another exclusive sales territory, which he considered less remunerative and less desirable than his former territory; and he rejected the offer for that reason. [R. pp. 26, 71-72, 94-98.] From March 1, 1946 to September 1, 1946, Ben Harris, the succeeding salesman, earned $6,387.16 in commissions from the sales of appellees' goods in appellant's former territory. [R. pp. 15-16, 27.] Figures for September, 1946, were not produced by the appellees. [R. pp. 16, 27, 39-40, 43, 88-92.] From April, 1946, until the date of trial (October 1, 1946), appellant earned $150 per week in other employment. If he had been restored to his

former territory he would have had to bear his own traveling expenses, which formerly ran to about $250 per month. [R. p. 27.]

The District Court dismissed the petition on the sole ground that the appellant's employment by the appellees was never in *"a position in the employ of any employer,"* within the meaning of Section 8(b), *supra.* The Court held that appellant was an "independent contractor," and as such not entitled to the benefits of the reemployment provisions. [Concl. 2, R. p. 28.]

However, the Court made, either inferentially or expressly, two further findings of fact pertinent to appellant's ultimate rights, to-wit:

(1) That: "Petitioner (appellant) has therefore suffered no damage, benefits or wages as contemplated by Section 308(e) of the Selective Training and Service Act of 1940." [Findings 7 and 8, R. p. 27.]

(2) That if appellant had accepted the other territory offered by the appellees, he "would have been restored to a position of 'like seniority, status and pay' similar to that held by petitioner (appellant) prior to his entry into military service." [Finding 6, R. p. 26.]

Appellant contends that the finding that he had suffered no loss of wages or benefits was both (a) mathematically inaccurate, and (b) involved an erroneous view of the proper measure for computing damages when an exclusive sales territory is wrongfully invaded, or appropriated, by an employer through another salesman.

He also contends that the finding that the offered position in another territory was one of "like seniority, status and pay" was both (a) immaterial, because even if correct, the employers' obligations under the reemployment provisions were not thereby fulfilled, nor appellant's rights affected; and also (b) that the finding is not supported by the evidence.

Questions Involved.

1. Did appellant have "a position in the employ of any employer" while employed by the appellees as their traveling salesman on commission with an exclusive sales territory?

2. Were the appellees required to restore appellant to the same position and territory upon his return and application therefor, either by law or agreement, where their circumstances had not so changed as to make it impossible or unreasonable for them to do so?

3. Was the position as salesman in another exclusive territory, offered on his return, an offer of a "position of like seniority, status and pay" to his former position?

4. What measure should be applied in computing appellant's "loss of wages or benefits" suffered by reason of the continued invasion and appropriation of his exclusive sales territory by the appellees?

5. Did the appellant suffer any such loss of wages or benefits from March 9, 1946 to September 1, 1946; and if so, in what amount?

STATEMENT OF THE CASE.

The Pleadings.

The Petition: The petition was filed August 23, 1946. [R. p. 8.]

It charged that the appellees M. R. Luster and A. M. Luster were partners doing business in their partnership name Sunbeam Furniture Company; that they maintain their principal office at Los Angeles, California, within the jurisdiction of the District Court; that their business is furniture jobbing, *i. e.,* selling at wholesale lamps, pictures and items of so-called occasional furniture, to retail dealers in a trade area embracing all of Southern California, from Fresno and Paso Robles south to the Mexican border; that this trade area is divided into two sales territories, one consisting solely of the City of Los Angeles, and the other of all of said trade area outside the City of Los Angeles; that appellees use one exclusive salesman in each of said two territories, and have so conducted their business since April, 1942. [R. pp. 2-3.]

The petition charged that appellant Brown left a position as "out-of-town" salesman in the employ of the appellees on February 26, 1943, in order to perform training and service in the United States Army under the requirements of the Selective Training and Service Act of 1940; that he was inducted into said army the next day (February 27, 1943), and satisfactorily completed his period of training and service, was honorably discharged therefrom, and received a certificate thereof on March 9, 1946, and on the same day (March 9, 1946), he applied to the appellees for reemployment; that he was then, and has ever since been, still qualified to perform the duties of his

former position, and that the appellees' circumstances had not then, and have not since, so changed as to make it impossible or unreasonable for them to reemploy and restore him to his former position in their employ; but that the appellees then failed and refused, and have ever since continued to refuse, to reemploy him in his former position, or in any other position of like seniority, status and pay, contrary to law. [R. pp. 4-5.]

The petition further charged that appellant has at all times been, and is now, ready and willing to render all the services required in his former position, but has been prevented from doing so solely by reason of the appellees' unlawful actions; that he promptly availed himself of the services of the Selective Service System to negotiate with the appellees for relief from such refusal and said negotiations having failed, he brings suit to enforce his reemployment rights through the United States Attorney. [R. p. 5.]

The position averred that as "out-of-town" salesman for the appellees from April, 1942, until February 26, 1943, he was the exclusive salesman of the appellees within the sales territory above described, outside of the City of Los Angeles, *i. e.,* from Fresno and Paso Robles south to the Mexican border; that his duties were to travel said territory and solicit sales from the appellees' customers therein, and about once a week to attend a sale display of appellees' goods in Los Angeles; to perform all such services under appellees' direction and control, and subject to their satisfaction, and subject to discharge at their pleasure; that the goods sold were appellees' goods, and that they fixed and determined the prices and terms of all sales; that his hours of work and the manner of the per-

formance of his duties were always subject to their control; that appellant's headquarters was appellees' office in Los Angeles; that his position was not temporary; that appellant paid his own traveling expenses; that his compensation was seven and one-half per cent of the sale price of all the lamps and pictures, and six per cent of the sale price of all the occasional furniture, sold by the appellees to any customers in appellant's said exclusive sales territory, regardless of whether or not the appellant actually secured the orders therefor; and that his average total earnings amounted to about $600 per month, computed and paid to him by the appellees once a month. [R. pp. 3-4.]

The petition averred that when the appellant entered the army, the appellees employed another salesman for his territory, and that the successor salesman has held the territory to date, under an agreement for a commission of 5 per cent on the sale price of all lamps, pictures and occasional furniture sold by the appellees within such territory, regardless of who might secure the orders; and that, even at such reduced rate of commissions, said successor salesman has made, for the two years last past, approximately $9,000 per year in commissions, or $750 per month, over his traveling expenses. The petition averred that the appellant would have earned commissions at that rate or more, ever since March 9, 1946, if he had been restored as appellees' "out-of-town" salesman at the rates of commission formerly enjoyed by him; and that he has lost $500 per month, more or less, ever since March 9, 1946, by reason of appellees' unlawful refusal to restore him thereto, and will continue to suffer a further loss at the same rate until restored. [R. p. 6.]

The petition averred that appellant's personal acquaintance as salesman in his former territory is of value to him, and that he would be handicapped in a territory where he is relatively unacquainted, and that placement in a territory where he is not well acquainted would not be restoration to a position of like seniority, status, and pay; that after March 9, 1946, the appellees offered to employ him as their exclusive salesman for the City of Los Angeles territory; but that as a sales producing territory for the appellees' goods, said "city" territory has always been, and is now, inferior to the "out-of-town" territory formerly held by appellant; and that it would be practically impossible for appellant to earn, in the "city" territory, commissions equalling those he should be earning now in his former territory. [R. pp. 6-7.]

The petition prayed that the appellees be specifically required to reemploy him for one year in his former position and territory, at his former rates of commission, subject to discharge solely for legal cause; and that they be required to compensate him for his loss of wages and benefits at the rate of $500 per month, or such other amount as may be just, from March 9, 1946, until such future restoration; that the court costs be taxed to the appellees; and that appellant have general relief. [R. p. 8.]

The Answer: The appellees' answer averred that they did business as partners from April, 1942, until October, 1942, as the Sunbeam Lamp Co., and thereafter as the Sunbeam Furniture Sales Co., which is the correct partnership name, rather than the Sunbeam Furniture Company; that the appellees operate throughout the entire West Coast and in other places in the United States, as

well as in the Southern California trade area described in the petition. [R. p. 9.]

The answer alleged that while appellant was the appellees' "exlusive salesman in the territory" mentioned in the petition, he did not serve them exclusively, but acted also "as salesman for other companies carrying other lines of merchandise in the furniture field;" that he was *subject to discharge by appellees at their pleasure* at any time, there being "no contract of employment;" that they "had no control over his hours of work and/or the manner of the performance of his duties;" and the answer denied that their office in Los Angeles was appellant's headquarters, or that he earned $600 per month commissions on their sales. [R. pp. 10-11.] An application for reemployment by appellant during the first week in April, 1946, was admitted, but the appellees averred that they offered him "a position similar to the one in which he was engaged before induction into the military service, but in another territory." It was also admitted in the answer that the appellees "*have employed* another salesman in the territory formerly covered by the petitioner herein upon the basis outlined in the petition, and *admit that said salesman has earned approximately the amounts set forth in the petition.*" but that they "have no information or belief upon the subject whether or not the petitioner would have been able to earn the same compensation had he *been so employed.*" (Emphasis supplied.) [R. p. 12.]

The answer denied "that it is the personal acquaintance of the petitioner in the sales territory claimed by him as being of value," but alleged that "it is the ability to furnish merchandise after receiving orders that constitutes the item of value." That it is "not necessary for a salesman

to be acquainted personally with the trade in any territory, but only that he shall have proper and saleable merchandise to sell." The answer further averred that appellant refused their offer of "the right to act as their exclusive salesman in the territory of the City of Los Angeles," and denied that such "city" territory is an inferior territory "compared to the petitioner's out-of-town territory," and denied "that it would be impossible for the petitioner or any other person to earn in the city territory *as much as was earned* in the out-of-town territory." (Emphasis supplied.) [R. p. 13.]

As a separate affirmative defense, the appellees pleaded that appellant "was never an employee within the definition or contemplation of an employee, but was an independent contractor . . . handling and selling lines of other furniture jobbers or manufacturers or wholesalers for compensation at the same time he handled and sold the commodities of the respondent herein"; and that they never withheld social security, unemployment tax, or any other withholding tax, and that they paid and treated appellant as an independent contractor, and "had no other control over him" except "as to the territory that he was to cover for them." [R. pp. 13-14.]

The appellees averred that within one month after they "*declined to reemploy the petitioner,*" except for his services as their exclusive salesman in the City of Los Angeles, he went to work for the Los Angeles Chair Company and has since continued to be employed there, earning sums greatly in excess of "the amount of money *that he earned while employed by the respondents*"; and that appellant is not "a person entitled to the benefits" of the reemployment provisions. (Emphasis supplied.) [R. p. 14.]

The Evidence.

From December, 1937, until February 26, 1943, appellant was a traveling salesman, engaged in calling on retail furniture dealers in the "out-of-town" territory, *i. e.,* Southern California south of Fresno and Paso Robles outside the City of Los Angeles. [R. p. 73.] The parties stipulated that he is well acquainted with such retail dealers. [R. pp. 26, 43-44, 101.]

Appellant first traveled the territory for his brother, Charles S. Brown, a furniture manufacturer of Los Angeles, doing business in the name of Charles S. Brown Company. In this employment, he sold a line of upholstered living room furniture. [R. p. 55.] That job ended in May or June, 1942, when the brother, Charles S. Brown, closed out his business due to the war. [R. pp. 55, 97.]

For about three or four months in 1941, he also sold a novelty line of goods for the Milton L. Gould Company, consisting of pictures, lamps and some small occasional furniture items in the same territory. He did not handle the Gould line in 1942, nor thereafter. [R. pp. 61-62.]

From April, 1942, until his induction in the Army, he traveled the territory for the appellees, selling pictures, lamps and occasional furniture. After the Charles S. Brown Company connection ended in May-June, 1942, he traveled the territory *for the appellees alone,* and thereafter *sold no other lines* than those of the appellees. [R. pp. 51, 54-55, 68.]

The Charles S. Brown and the Milton L. Gould lines were the only others handled by appellant in the territory at any time. [R. pp. 54-56, 68, 80.] For the last nine months he handled only the appellees' merchandise.

The appellees were partners engaged in manufacturing lamps until about October, 1942. In about that month they went into the wholesale furniture jobbing business, according to appellee M. R. Luster, and have so continued to date. [R. p. 78.]

On July 1, 1946, the appellees converted their partnership into a corporation, in which they are the sole stockholders and officers. It is conceded that the appellees could, through their corporation, restore the appellant to his former position and territory in their employ, and that for purposes of this suit the identity of the partnership and the corporation is the same. [R. pp. 23, 74-75, 83-84, 110.]

At the opening of the trial counsel for the appellees stated:

> "If the court please, I believe that the principal issue that the court will be asked to dispose of is whether or not the petitioner in this matter is, as the respondents contend, an independent contractor and therefore not entitled to the benefits of the act under which he proceeds, or whether he is an employee. If the court should find that he is an employee, we can stipulate that the respondents' position *has not changed* so materially as to make it impossible to re-employ the petitioner in *the same* or similar job as the one he had before he entered the military service of the United States.
>
> "Further, there is the question of whether or not the job the evidence will show was offered to petitioner was in fact the same or similar job within the contemplation or meaning of the act and therefore his refusal would constitute such an action on his part as to not entitle him to the benefits of the act.

"I think these, your Honor, are the issues and we can stipulate to almost everything except that." [R. pp. 36-37.]

Later, appellee M. R. Luster testified:

"Q. And the corporation could through yourself and your father reinstate Mr. Brown in his former territory? A. Yes, we could." [R. p. 84.]

Mr. Luster did not deny the previous testimony of the appellant to the effect that at a meeting between himself, Ben Harris, and the appellant, on about February 15, 1943, at the store, it was agreed between the three that Harris would take over the appellant's territory while appellant was in the army and that the appellant would have it again when he came back. [R. pp. 69-70.] Mr. Luster did not deny either the meeting or the statements. [R. pp. 74-92, 107.]

The parties stipulated at the opening of the trial that the appellant rendered military service, and was honorably discharged therefrom, as asserted in the petition, and that he applied for reinstatement in his former position within due time thereafter. [R. p. 37.] It was also stipulated that he was qualified to perform the duties of his former position, and that his former rates of commission were, in fact, as stated in the above outline. [R. pp. 38, 108-109, 4, 7.]

Such commissions were payable only *after shipment* of the goods ordered, *not when the orders were taken.* [R. pp. 24, 54, 64-66.]

The parties stipulated that during the period prior to appellant's departure, "it was difficult to secure or make delivery of items of merchandise for which orders might

be taken," and that "it is relatively easier to make deliveries in 1946, although difficult." [R. p. 44.]

As a result, many orders taken by appellant in 1942-1943 were cancelled in April, 1943, because of the appellees' inability to make delivery of the goods, due to the war. Possibly $25,000 worth of such business was so cancelled [R. p. 65], and appellant received no commissions thereon. His commissions on cancelled orders, even at the six per cent minimum, would thus have been $1,500. [R. pp. 68-69.]

Although in military service, appellant continued to receive commission checks from appellees from February to May, 1943, on shipments for which he took orders from December 1, 1942, to February 26, 1943. [R. pp. 11, 101-103.]

The parties stipulated that Defendants' Exhibit "A" [R. pp. 15-16] contains a correct statement of the commissions earned by Ben Harris in appellant's former territory during January 1-August 31, 1946, under the improved delivery conditions [R. pp. 39-40, 42-43], to wit, $7,344.37, or an eight-month average of $919.27 per month. [The total $7,344.37 commissions earned in this period is found by substracting the $1,611.11 January 1 unpaid balance from the $8,955.49 total commissions shown on Exhibit "A."]

Former earnings by appellant in the same territory, under less favorable conditions, are not as clearly shown by the proof and findings of the Court, as are Harris' 1946 earnings.

At the beginning of the trial the parties stipulated, without contest, that the figures given in appellees' answer [R. p. 11] as to the amounts of commissions *paid to*

appellant per month from October, 1942, through April, 1943, were correct. [R. pp. 38, 59-60, 64-66.] Later, however, it was testified to by Mr. Luster himself, upon discussing Defendants' Exhibits "B" and "C" [R. pp. 17-22], that the stipulated figures in the answer are incorrect, and that appellant was actually paid the larger sums listed on said Exhibits "B" and "C." Mr. Luster personally copied these figures from the appellees' ledger book, and then rechecked them during the trial, after the differences between the exhibits and the answer were called to his attention. *He declared the former are correct.* [R. pp. 17-22, 76-77, 86-87, 107.]

Nevertheless, the District Court, in its oral opinion, still adhered to the figures in the answer, in discussing appellant's pre-military work, and failed to note in this oral opinion, that although he received commissions during March-May, 1943, appellant was not then working, but was in the army. [R. pp. 112-114.]

The correct figures shown on Exhibits "B" and "C" demonstrate that appellant took orders in the three months December 1, 1942, to February 27, 1943 (the date of his induction), upon which he was *paid* commissions totaling $1,935.66 during the six months, December 1942-May 1943, or a three-month-of-work average in excess of $600 per month, as charged in the petition [R. pp. 4, 101-104], without considering the orders cancelled in April, 1943.

Exhibits "B" and "C" also show the effect of the change in the type of business of the appellees in October, 1942, on appellant's earnings. [R. pp. 64, 78.] In the two years, October, 1940, through September, 1942, while the appellees were manufacturing lamps, appellant's total commissions on lamps were only $760.19. In the next three months (October-December, 1942) with furniture added,

appellant's commission payments were $1,082.63; and although in 1943 he worked only two months (January and February), he received commission payments in that year of $1,168.60. [R. pp. 17-19.] Total commission payments after October 1, 1942, were thus $2,251.23, attributable to five months of work (October, 1942, through February, 1943); and if the $1,500 of potential commissions on $25,000 of orders cancelled in April, 1943, be added to the $2,251.23 actually paid, a potential five-months-of-work average in excess of $750 per month is shown, further supporting the allegations of the petition that appellant was making "about $600" per month prior to induction. [R. pp. 4, 17-19.]

With improved delivery conditions in 1946, Ben Harris was making only $919.27 per month in this same territory, or about $750 per month more than his expenses, as alleged in the petition. [R. p. 6.]

The parties stipulated at the opening of the trial that the appellant "is personally and well acquainted with furniture dealers and purchasers of the products of the respondent in the trade territory described as Southern California outside of Los Angeles" [R. p. 43], and that "he is qualified to perform the duties of his former position" [R. p. 38]; also, that "he was the exclusive salesman for that territory in the sense that, and it is the fact that, he received commissions on the sales of all of the respondents' products delivered to any merchant or purchaser within his sales territory, regardless of whether he made the sale or not." [R. p. 42.] It was also stipulated that appellant was "offered the position of salesman in the City of Los Angeles territory" [R. p. 40], and that between July 1, 1941, and August, 1943, the appellees did not have a display of their goods at the Los Angeles Merchandise

Mart. [R. p. 46.] It was later stipulated that appellant was "diligent" in seeking relief through the Selective Service System. [R. p. 72.]

After these stipulations, the sole matters remaining for proof were the details reflecting the exact character of the employment relationship between appellant and the appellees, and showing whether the "city" territory was as desirable as the "out-of-town" territory. The proof on those points follows:

1. Employment Relationship.

Milton R. Brown testified: That his headquarters was, and that he covered his territory from, the Sunbeam Furniture Sales Company office at 1337 South Flower Street, in Los Angeles, where he went two or three times a week [R. pp. 50-53]; that he was there about half the Fridays, taking care of customers who might be in town, which was the practice in the wholesale furniture trade [R. pp. 51-53], and on every Saturday morning. That he got his mail and messages there from customers [R. p. 51], and there waited on customers, including Los Angeles customers, on the sales to whom he received no commission. [R. pp. 52, 55-56.] That the goods he sold were the goods of the Sunbeam Furniture Company alone, that the sales were made in their name, and were taken on order pads furnished by them, at prices which they fixed. [R. p. 51.] That he had nothing to do with collections. [R. p. 51.] That he was paid his commissions by check of the company, after shipments. [R. p. 52.] That the appellees held sales meetings of their salesmen, of which he was notified to attend, and which he attended. [R. pp. 56-57.] That he was instructed by them not to call on certain customers, because of financial reasons, and to call

on other specific customers. [R. p. 57.] That the appellees did not have him punch a time clock or report for duty at any particular time of the day, but that he knew he had to "get the business" to stay employed by them. [R. pp. 57-58, 63.] That he paid his own traveling expenses. [R. p. 58.] That his employment was not for any definite or fixed period of time, was terminable at will, and was verbal only. [R. p. 66.] That social security and unemployment taxes were not withheld from his commissions by the appellees, but that he does not believe they were withholding for income taxes at the time. [R. pp. 66-67.] That he was not given any sales quota to meet, but that from June 1, 1942, onward, he devoted his full time to the sale of the appellees' products alone. [R. p. 67.] That if he traveled for both his brother and the appellees simultaneously, at any time, it was for a period of not more than a month or six weeks, before June 1, 1942, and that after that date the appellees were his sole employers. [R. pp. 67-68.] That he took up the matter of the appellees' refusal of reemployment promptly with the Selective Service System, and has always been ready to go back to work for appellees in his former territory, ever since his application therefor. [R. p. 72.]

Melvin R. Luster testified: That he is a partner of his father in the Sunbeam Furniture Sales Company, which was incorporated on July 1, 1946, at the Sunbeam Furniture Company, with themselves as the sole stockholders and officers. [R. pp. 74-75, 83-84.] That it was not "necessary or required" of the appellant that he be at the Sunbeam store, or at the Los Angeles Furniture Mart, on Friday of each week, or on any day of the week. That he does not know how the appellant covered his territory

other than by automobile and by visiting the individual towns; but that the appellant would usually come to the office whenever he was in town to see if any new merchandise was available. [R. p. 79.] That the appellant was given no instructions as to fixed hours of work, or how he should travel, or as to his method of soliciting orders; that the appellees knew that he was also selling for other companies, to wit, Charles S. Brown and Milton Gould, and after June 1, 1942, did not require him to act exclusively as their sales representative in the territory. [R. pp. 80-82.] That they gave him no sales quota, nor instructions as to what customers he should call on, and did not withhold taxes on his commissions.

This was all the evidence on the character of the relationship between the parties.

2. "Similarity of Territories."

Milton R. Brown testified: That Barney Silver (sometimes spelled Silbers in the record) was the salesman in the "city" territory when he applied for reemployment. [R. p. 54.] That he believes that he could have earned, in the "city" territory, during April to September, 1946, amounts of money per month equal to those that were actually paid to him as commissions in the months October, 1942, to April, 1943, for traveling the "out-of-town" territory [R. pp. 59-60]; but that he turned down the offer of the "city" territory on his return because he "felt the (city) territory was not as lucrative as the outside territory," that there was not as much money to be made in the city territory, and that it "takes a good deal more work for less money." [R. p. 71.] Explaining the factors

which make the outside ("out-of-town") territory preferable to the city territory in the appellees' line of business, he said:

> "In my opinion the possibilities of more money on the outside is because you have more dealers to call on who are smaller stores. The Sunbeam Furniture Sales, except possibly for a small part of their line of business, are jobbers of merchandise which they purchase in the East and is sold by their salesmen here, and (if you) go to the larger stores in Los Angeles such as Barker Brothers, May Company and Bullock's, those large stores have the same access to that merchandise as Sunbeam Furniture Sales, and Sunbeam Furniture Sales naturally must make a mark-up in their price to stay in business, and I did not feel, and I believe I am right, in not wanting to sell larger stores that line of merchandise; and I didn't feel that I could make *anywhere near* the amount of money as in the outside territory.
>
> "In the outside territory, the dealers may not see you for six weeks and when they do see you they will buy a lot more than the larger dealers in town that may see you every day. There is no limit to what the dealers in the outside territory will buy, but that is not so with the metropolitan territory." [R. pp. 71-72.]

Melvin R. Luster testified on direct examination: That in his opinion it was possible for appellant to have earned "as a salesman in the City of Los Angeles *as much money per month as he earned in his prior employment with the respondent company as evidenced by (Defendants') Exhibits B and C.*" Also, on direct examination:

> "Q. Mr. Luster, do you have an opinion as to whether or not the territory of the City of Los An-

geles was as desirable to sell merchandise of the type sold by your company as was the outside territory? A. *Today* it is just as desirable.

Q. I am sorry but I didn't get your answer. A. I say today the Los Angeles territory is as desirable.

Q. Is there any particular reason for that? A. Yes. It is because we have changed our method of operation somewhat since 1942. Now we are manufacturing about *50 per cent* of the items we used to buy direct from factories and it enables us to go ahead and sell our merchandise to the large department stores in the Los Angeles area which was *something we were unable to do before.*" [R. pp. 78-79.]

Later, he was brought back to the same subject by his counsel, and was permitted to testify, over objection, that in his opinion, the territory offered appellant on his return was a "like position" to his former territory, "from the standpoint of income," "seniority" and "status." [R. pp. 82-83.]

On cross-examination, Mr. Luster said that he had the books of his company which show the amount of sales actually made in 1946; that their exclusive salesman in the city territory is Barney Silber, and that he had in hand the books from which he could give the commissions paid to Mr. Silber and Mr. Harris since the first of the year 1946. [R. pp. 84-85.] Asked to give those figures, he examined his books, and said:

"I don't seem to find the postings for commissions paid commencing January in the ledger. They evidently don't have that information in here. I can explain that also. I don't have the correct ledger here." [R. p. 85.]

It then developed that what he had was a bank control record book which showed no recipients of checks, and that he had nothing to show even the Harris commission payments. [R. pp. 85-88.] That he had not brought any ledgers showing the comparative Silber and Harris commission payments in 1946, in response to the appellant's subpoena therefor. [R. pp. 88-89, 91-92.]

On cross-examination, Mr. Luster testified that Al Feldman was the appellees' "city" salesman in 1940-1942; and he was asked to give the commissions paid to Mr. Feldman from October, 1942 to February, 1943, for the purpose of comparison with appellant's commissions in the same period. The Court, however, sustained appellees' objection to the evidence on the ground of "immateriality" and change of "conditions at the time the act requires reemployment." However, he then testified:

> "Q. Mr. Luster, it is a fact, is it not, that city salesman at the time Mr. Brown was the salesman down there did not earn or receive as much commission as Mr. Brown? . . . A. We did not employ a city salesman permanently, and we did not have Mr. Brown cover his territory. Consequently, his earnings would have been less than Br. Brown's.
>
> Q. Well, I didn't understand why you say that is true. A. His earnings would have been less because he worked on and off for us, never continuously." [R. pp. 90-91.]

Other than this, Mr. Luster gave no comparison of commission payments to support of his "opinion."

Charles S. Brown testified: That he is the appellant's brother, and that he has been in the furniture business in Los Angeles since 1921, as a manufacturer, wholesaler or retailer, but not as a jobber; and was in the furniture

manufacturing business from June, 1936 for six years, and is now the general manager of the Barker furniture stores in Los Angeles. [R. pp. 93, 100.] That the appellant ceased traveling for Charles S. Brown Company in June, 1942. [R. p. 97.] That he (the witness) has personally traveled the "city" and the "out-of-town" territories himself, and sold bedroom, dining room, living room and odd-piece furniture, and that the "out-of-town" territory is preferable for a jobber's or small manufacturer's salesman, and that it is accepted in the trade that there is "no comparison" between the two territories. [R. pp. 95-96.] That large eastern manufacturers will sell the large Los Angeles stores, and give them special, sometimes state-wide, exclusive arrangements, and salesmen handling those lines will find the city territory better, but not the salesman for the smaller manufacturer. [R. pp. 95-98.] That the large stores, such as Barker Brothers and Bullocks are not as interested in buying from salesmen as are the "out-of-town" dealers; and that statistics show that there are *twice as many* small retail stores in the "out-of-town" territory from Fresno south through San Diego, as there are in the City of Los Angeles. [R. p. 98.] That the outside territory is preferable, taking into account the increased cost of traveling the same. [R. p. 98.] That he has been engaged as a manufacturer or distributor of the type of furniture sold by Sunbeam Furniture Company. [R. p. 100.]

The Court, in its oral opinion, took note *sua sponte* of the expansion of building, and increase in population, "in Los Angeles County", as reported in the newspapers, and said:

> "In view of the testimony, the court is not required to pass upon whether or not the offer of the respon-

dents (appellees) is of like seniority, status and pay, but *if required to,* would hold that offer was in good faith made to the petitioner of like seniority, status and pay. The testimony of one of the respondents was to the effect that petitioner could have earned in April, May, June, July and August in the City of Los Angeles *the amounts of commission that he made prior to his induction.*

"The court holds, therefore, that the petitioner was an independent contractor and not entitled to be reinstated under the section of the law that the court has called attention to." [R. pp. 117-118.]

Finding of Facts, etc., Judgment and Appeal.

The District Court thereafter entered findings of fact and conclusions of law [R. pp. 23-28], and judgment dismissing the petition on October 16, 1946 [R. pp. 29-30]; and appellant filed his notice of appeal on January 13, 1947. [R. p. 30.] An extension of time for filing this brief until May 27, 1947, was granted by this Court.

Specification of Errors.

1. The District Court's Conclusion of Law No. 2, that appellant "failed to show that prior to his induction into the United States Army he held a 'position in the employ' " of the appellees, within the meaning of Section 8(b) of the Selective Training and Service Act of 1940, is erroneous, and not supported by the pleadings, the evidence, the Court's finding of facts, or the applicable law. [R. pp. 28, 31.]

2. The District Court's Conclusion of Law No. 2, that appellant's "contractual status was that of an independent contractor" and as such was "outside the scope of" the

reemployment provisions, is erroneous in law; and not supported by the evidence, or the Court's findings of fact, which clearly show that appellant was merely a "servant" of the appellees. [R. pp. 28, 31-32.]

3. The District Court erred in its finding that the offer of the City of Los Angeles territory was an offer of a "position like seniority, status and pay" to that of appellant's former territory and position; because such finding is not supported by the evidence. [R. pp. 26, 32, 117-118.]

4. The District Court erred in holding, by inference, that the offer of another territory, *i. e.*, the City of Los Angeles territory fulfilled the appellees' obligation to restore appellant to his former territory. [R. pp. 26, 32-33, 117-118.]

5. The District Court erred in its finding that appellant "suffered no loss of wages or benefits" prior to the trial, within the meaning of Section 8(e) of the Act aforesaid; because said finding is not supported by the evidence; and is (a) mathematically inaccurate, and (b) based on an erroneous measure for computing such loss. [R. pp. 27, 33-34.]

6. The District Court erred in failing to find that petitioner has suffered a "loss of wages or benefits" equal to the commissions he would have earned, at his former rates, on sales made in his former territory by other salesmen in appellees' employ after March 9, 1946, without any deductions for (a) traveling expenses or (b) earnings in other employment, *i. e.*, that he has suffered a loss slightly in excess of the $6,387.16 commissions earned by Ben Harris in the same territory for the period March 1 to September 1, 1946. [R. pp. 27, 34.]

ARGUMENT.

Summary

Appellant contends, within the meaning of Section 8 of the Selective Training and Service Act, as amended: (1) that he "left a position in the employ of any employer", regardless of whether under the law of torts, or under other statutes, his relation to the appllees could be classified as that of a "servant", "agent", "employee" or "independent contractor"; (2) that he was not offered "a position of like seniority, status and pay" by the appellees, and that, even if he was, he was entitled to be restored to his former territory, because it was not impossible or unreasonable for the appellees to do so; and (3) that he is entitled to be compensated for his "loss of wages or benefits" in a sum equal to the commissions, at his former rates, that he would have drawn on actual sales that have been made in his former exclusive sales territory from March 9, 1946, to the date of his future restoration thereto, undiminished by the probable traveling expenses he would have incurred in making such sales, or by any interim earnings from his other employment.

The Questions Involved, *supra*, and Specification of Errors, *supra*, fall logically into the three categories separately numbered above; and this Argument will be divided into three parts accordingly.

The District Court's principal reliance was placed on the opinion in *Levine v. Berman* (DC, ND, Illinois, 1946), as indicated by the reference thereto, in the Court's oral opinion. [R. p. 116.] The case of *Levine v. Berman* was reversed and remanded by the Seventh Circuit Court of Appeals on May 6, 1947, it being Case No. 9176 on

that Court's calendar.* Appellant relies on the appellate court's opinion ordering such remand, and on *Whitver v. Aalf-Baker Mfg. Co.* (DC, ND, Iowa, 1946), 67 F. Supp. 524, as well as other authorities cited below.

1. Appellant Had a "Position in the Employ" of the Appellees.

Reference is made to the summary of the evidence set forth above under the heading Employment Relationship, and also to the District Court's Findings of Facts [R. pp. 23-28], and to the admitted fact that his employment was terminable at will by the appellees [R. pp. 3, 10-11, 66-67], as showing that appellant did have "a position in the employ of any employer", under the Act.

The expression "position in the employ of any employer" is to be construed "as liberally as possible" in favor of returning veterans. *Kay v. General Cable Corp.* (3 CCA, 1944), 144 F. (2d) 653, 656; *Fishgold v. Sullivan Drydock & Repair Corp* (1946), 328, U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 960; *MacMillan v. Montecito Country Club* (DC, SD, Cal., 1946), 65 F. Supp. 240.

The expression "has left or leaves a position in the employ of any employer" was newly devised by the Congress, in legislating the manpower of the nation into military training for one year. It was clearly intended by that new phrase, to cover a wider field than is normally described by the word "employee", which was significantly omitted. *Kay v. General Cable Corp. supra.* By using

*The opinion of the Seventh Circuit Court of Appeals in *Levine v. Berman* will probably appear in the Advance Sheets of Vols. 160 or 161 F. (2d) before hearing. If not, appellant will then move for leave to file certified copies of the same.

the new phrase, the Congress intended to avoid the legal confusion and conflicts that have grown up in the law of torts, and under particular statutes, as to the meaning and application of the words "employee" and "independent contractor." Its aim was to confer reemployment rights on any selectee who, in order to enter military training, should leave any "position in the employ of any employer."

The Congress manifestly intended that the words should have the broadest possible application, and that they should be given their *full sweep*, to the end that *every selectee* who rendered personal services to another for compensation, in a relationship other than temporary, might have that employment restored, unless it should be impossible or unreasonable for the employer to restore him.

In the *Kay* case the Third Circuit Court of Appeals said:

> "Of course, the words are not applicable to independent contractors, but, except for casual or temporary workers, who are expressly excluded, they cover *almost every other kind of relationship* in which one person renders regular and continuing service to another."

A true "independent contractor" is one who *contracts* to produce a specified result for specified compensation, by means of his own choosing. He cannot, with impunity, be discharged by his employer, except for cause; and he cannot, with impunity, fail to produce the result he has contracted to produce. In other words, his "position" is "temporary", *i. e.*, confined to a particular task, and he is for that reason, and that reason only, excluded from the coverage of the Act. *California Labor Code*, Sec.

3353; 45 *C. J. S.* 638-641, 31 *C. J.* 473-475, 39 *C. J.* 1315, 25 *C. J. S.* 580-582; *Restatement of the Law of Agency,* Secs. 2, 220, 236.

Such is the meaning implicit in the sentence quoted from the *Kay* case opinion, *supra.*

Etymologically, the words "a position in the employ of any employer" mean "a place in the use of a user of the services of another for compensation." *Black's Law Dictionary* (3d ed.), pp. 657-658. *Webster's New International Dictionary.* They would include even a true "independent contractor", but for the exclusion of "temporary positions" from the coverage of the Act. The word "employee", in its broadest connotation, includes an "independent contractor."

The words used have been liberally construed to include positions held by the following:

A physician. *Kay v. General Cable Corp., supra.*

A golf professional. *MacMillan v. Montecito Country Club, supra.*

A lawyer. *Clark v. Housing Authority.* (Wash., 1946), 171 P. 2d) 217.

A police officer. *Hancbuth v. Patton* (Colo., 1946), 170 P. (2d) 526.

A sales agent, on commission. *Lee v. Remington Rand, Inc.* (DC, SD, Cal., 1946), 68 F. Supp. 837.

A branch manager, sharing profits. *Anderson v. Schouweiler* (DC, SD; Idaho, 1945), 63 F. Supp. 802; *Salter v. Becker Roofing Co.* (DC, MD, Ala., 1946), 65 F. Supp. 633; *Dobbs v. Williams* (DC, Ariz., 1946), 68 F. Supp. 995; *Stanley v. Wimbish* (4 CCA, 1946), 154 F. (2d) 773.

A salesman on commission, with an exclusive sales territory. *Levine v. Berman* (7 CCA, May 6, 1947), to be reported; and *Whitver v. Aalfa-Baker Mfg. Co.* (DC, ND, Iowa, 1946), 67 F. Supp. 524.

The appellant in this case was clearly not an "independent contractor" because he did not contract to produce any particular quantity of business, and because he was *subject to discharge at will, i. e.,* without recourse. The right to discharge at will gave the appellees the *power* to control the means and methods by which he would perform his services: and the fact that, in the absence of instructions from the appellees, he worked according to his own ideas, or that he was paid on a commission basis instead of by the day, week or month, did not make him an "independent contractor." He was the "employee", or "servant" of the appellees in all his activities. *MacMillan v. Montecito Country Club, supra;* 16 *California Jurisprudence* 958-959; *Ryan v. Farrell* (1929), 208 Cal. 200, 280 Pac. 945; *Lee v. Remington Rand, Inc., supra; Claremont Country Club v. Indust. Accident Com.* 1917), 174 Cal. 391, 163 Pac. 209; *Phillips v. Larrabee* (1939), 32 Cal. App. (2d) 720, 90 P. 820.

The appellant's duties were simply to take orders for appellees' goods, in appellees' name, on appellees' order pads, from appellees' customers, at appellees' prices, on appellees' terms, subject to appellees' approval, in a territory fixed by the appellees; and to perform those duties to the appellees' satisfaction, subject to discharge with or without cause, at appellees' pleasure, and without recourse.

None of the elements of a true "independent contractor" thus appear in the record.

He was not even an "agent" in the sense that an agent may bind his principal by contract.

He was merely a "servant", entrusted, in the absence of specific instructions, to use a certain amount of discretion in performing his duties. None of the facts set forth in the District Court's Finding No. 5 [R. p. 24-26] militate against this conclusion.

Nor would it have affected the conclusion if the appellant had, without objection from the appellees, been also handling a line of merchandise for other concerns. "Shared servants" are not "independent contractors", for each employer has the power to control the common servant to the extent that he may consider necessary to his own business.

Nothing in the record supports the District Court's Conclusion No. 2 that appellant did not have "a position in the employ" of the appellees, within the meaning of the reemployment provisions. Whether his relation might be called that of an "independent contractor" under the law of torts, or under other statutes, is immaterial to this case: and the authorities cited above show that even in the law of torts, or under other statutes, his relationship in California would not be considered that of an "independent contractor."

Appellant was entitled to and was not excluded from, the benefits of the reemployment provisions.

2. "Position of Like Seniority, Status and Pay."

The evidence on this point is summarized under the heading "Similarity of Territories" *supra*.

The theory is implicit in the District Court's oral opinion and findings of fact [R. p. 26, 117-118], that because,

under improved business and delivery conditions in 1946, appellant could have made in the "city" territory *as much* in commissions as he did in his former territory prior to his induction, the appellees' offer of the "city" territory was a fulfillment of their obligations under the reemployment provisions.

A like theory followed by the District Court in *Levine v. Berman* was expressly overruled by the Seventh Circuit Court of Appeals in the Opinion heretofore referred to. The appellate court said:

> "So it was possible to give the petitioner his old territory with whatever allotment (of merchandise) the territory was entitled to. Nor do we think it unreasonable to require the respondent to do so. . . . *Since it was possible to restore the petitioner to his old territory he was entitled to it under the law.*" [Explanatory parenthesis inserted.]

This view of the meaning of the reemployment provisions of Section 8 of the Act is parallel to that of the Director of Selective Service, who, in Section 301.7 of his interpretative *Handbook—Veterans Assistance Program*, says:

> "In the event that a private employer's circumstances have so changed as to make it impossible or unreasonable for the employer to restore the veteran to his former position, the employer is obligated to restore the veteran to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make such restoration also impossible or unreasonable."

The Act itself declares in Section 8(c), that: "Any person who is restored to a position in accordance with

the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been *on furlough or leave of absence* during his period of active military service", etc. An employee normally takes a leave of absence from the duties of a particular job, *i. e.*, his previous employment continues without change pending his return. It has been held that one absent in military service is an "employee" of his pre-service employer. *In re Walker's Estate* (1944) 53 N. Y. Supp. (2d) 106; *Thompson's Estate* (1925) 126 Misc. 91, 213 N. Y. Supp. 426; *Howey v. Grier* (1929) 324 Mo. 634, 23 S. W. (2d) 1058. Presumptively, therefore, a veteran will return to the precise job he had before he entered military service; and that it is his legal right to do so is not negatived by the added statutory obligation of the employer to restore him to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

The provision for restoration to employment in a "like" position is an additional obligation imposed on the employer, and not an additional condition imposed on a veteran's right to be restored to his old job. If the Congress had intended the latter, it would not have provided for restoration "to such position", *i. e.*, to the veteran's former position; but would have simply directed that the veteran be given "a position of like seniority, status and pay", which, of course, would have included his old job, if the employer desired to place him therein.

The requirement that the veteran be "restored" to his former position "or a position of like seniority, status and pay" is a requirement that he be offered his old job first,

unless that is made impossible or unreasonable by the employer's changed circumstances.

With respect to sales territories, a returning veteran is entitled to his former territory, unless it is impossible or unreasonable to restore him thereto. *Levine v. Berman* (7 CCA, May 6, 1946) quoted above; *Whitver v. Aalfs-Baker Mfg. Co.* (DC, ND, Iowa, 1946) 67 F. Supp. 524; *Mihelich v. Woolworth Co.* (DC, Idaho, 1946) 69 F. Supp. 497; *Stanley v. Wimbish* (4 CCA, 1946) 156 F. (2d) 538; *Salter v. Becker Roofing Co.* (DC, MD, Ala., 1946) 65 F. Supp. 633.

Furthermore, the evidence in this case does not show that "a position of like seniority, status and pay" was offered to the appellant.

Note that the alternate position must be one of "like seniority" and "like status," as well as of "like pay."

Prior to his induction, the appellant's territory was admittedly the better of the two territories. The "city" territory had only half as many small furniture dealers in it as the outside territory. Commissions made therein were less; and were so small, in fact, that the appellees did not keep a salesman in it "permanently." Salesman worked it off and on, not regularly, according to Mr. Luster. And there was no evidence that the commissions actually earned in "city" territory ever have equalled those made in the "out-of-town" territory, *even in 1946.*

Therefore, the "status" of "city" salesman was necessarily inferior to that of the "out-of-town" salesman; and from the proof if would seem that his "seniority" must also have been inferior.

The proof is clear that the position offered appellant was inferior in status to his former position in the appellees' employ. To accept it would be obviously a demotion. There is nothing in the proof except the unsupported "opinion" of Mr. Luster, to indicate that it might have been possible, even in 1946, to earn as much in the city as in the out-of-town territory; and though he had access to the figures showing the comparative earnings in the two territories in 1946, Mr. Luster did not produce them. Other opinions, equally as good, and better founded on statistical facts, were that there is "no comparison" between the earnings of salesmen in the out-of-town territory and in the city territory.

The burden of proof was on the appellees to show that the city territory was one of "like seniority, status and pay"; and such proof as there is on the subject, is all to the contrary.

The same matter, to wit, whether a *guarantee of commissions,* in another territory, equal to the amount of those formerly earned by a returning veteran in his former territory, is an offer of "a position of like seniority, status and pay", was considered in *Levine v. Berman, supra.* The appellate court said:

> "We cannot therefore, say that it would be unreasonable, and certainly not impossible to restore the petitioner to his territory under allotment (of merchandise) at his old commission (of ten percent). We cannot say it is unreasonable unless we are to say that the returning serviceman shall not share in the abundant prosperity when he returns. We are not prepared to go that far. Indeed, the tenor and purpose of the Act guide us in a different direction. . . .

> " 'Unreasonable' means more than inconvenience or undesirable. *Kay v. General Cable Corporation, supra,* at p. 655. We think it means more than having to share the profits of a booming business inordinately prosperous because of the war the petitioner went away to serve in. Therefore, we do not think it impossible or unreasonable under the court's findings for the respondent to restore the petitioner to his *former status,* modified only by the necessity of an allotment (of merchandise), and to pay him his *old commission,* and the court erred in its conclusion of law that it was impossible or unreasonable." [Explanatory parenthesis inserted.]

Appellant's "pay" was determined by the sales price of merchandise sold, and was not a fixed sum per week or month. He is entitled to the same "pay" and to his former "status" and "seniority" in the appellees' employ. He is not limited by the actual amounts he formerly was able to earn under less favorable conditions.

The offer of the city territory is thus not shown by the proof to have been an offer of "a position of like seniority, status or pay;" and, even if it had been, such offer did not fulfill the appellees' legal obligation to restore the veteran *to his former territory* at his request.

Furthermore, the appellees agreed, when appellant left for military duty that, on his return, he would have his old territory restored to him. In all fairness, the appellees ought not to be successful in ignoring, at will or whim, both the law and their own agreement. The appellees have offered no reason for their refusal to give appellant his former territory. *They simply did not choose to do so.* That is the sole explanation of their actions indicated by the record.

3. "Loss of Wages or Benefits;" Proper Measure Therefor.

The District Court's finding that appellant "suffered no damage, benefits or wages as contemplated by" the re-employment provisions, is arithmetically inaccurate. For, even at his reduced rate of commission, Ben Harris earned $6,387.16 between March 1, 1946, and September 1, 1946; while at $250 per month, appellant's traveling expenses during this same six-month period would have amounted to only $1,500, and appellant earned only $150 per week in other employment from April, 1946 to September 1, 1946, or an outside total of $3,150 for the 21-week period. Result: $6,387.16 minus $3,150.00, minus $1,500.00, leaves a $1,637.16 loss of earnings, after deducting all possible items of charge. [See Findings 7 and 8, R. p. 27.]

The above "loss" figures are not carried through September, 1946, because Harris' earnings during that month were not disclosed by the appellees. But a substantial loss up to September 1, 1946, is shown by the proof. And the Court's contrary finding is not supported by the evidence. Since the appellee's answer admitted that Harris is making about $900 per month in appellant's former territory, it is probable that the above $1,637.16 loss was increased during September, 1946, and at the time of trial (October 1, 1946), was considerably more.

In *Boston & Maine Railroad v. Bentubo* (1st CCA, March 7, 1947), 160 F. (2d) 326, it was held that the power of the District Court to award a veteran compensation for his "loss of wages or benefits" is legally, historically and etymologically, similar to the power of the National Labor Relations Board to award "back pay" under *29 U. S. Code Sec. 160(c)*.

This Court has held that the National Labor Relations Board is *not required by law* to reduce a back pay award by amounts an illegally discharged employee has earned in other employment. *N. L. R. B. v. Carlisle Lumber Co.* 9 CCA. 1938), 99 F. (2d) 533, 539-540, cert. den. 306 U. S. 646, 83 L. ed. 1045, 59 S. Ct. 586.

Appellant recognizes the fact that both the making, and the amount, of an award of a veteran's loss of wages, etc., are within the "sound discretion" of the District Court [*Boston & Maine Railroad v. Bentubo, supra,* p. 328-329]; but submits that a *finding of fact* that no loss is shown to have been suffered, when the evidence is to the contrary, is not a proper exercise of such discretion.

Appellant was entitled by law to be restored to his former territory, and commission rate, for one year; and has stood in the same relation to the appellees ever since March 9, 1946, as a commission agent, whose exclusive territory has been invaded by his principal in violation of their contract. His "loss of wages and benefits" should therefore, be measured by the amount of commissions he would have earned, at his former rate, on any goods sold by the appellees in his former territory since March 9, 1946, through Ben Harris, or otherwise. *Smythe Sales Inc. v. Petroleum Heat & Power Co.* (3 CCA, 1942), 128 F. (2d) 697, 700-701; *Brach & Son v. Stewart* (1925, Miss.), 104 So. 162, 41 A. L. R. 1172, and Note, pp. 1178-1184; *Agency,* Sec. 309, 2 Am. Jur. 241; *Schiffman v. Peerless Motor Car Co.* 1910), 13 Cal. App. 600, 110 Pac. 460; *Erskine v. Marchant* (1918), 37 Cal. App. 590, 174 Pac. 74; *Yaguda v. Motion Picture Publications, Inc.* (1934), 140 Cal. App. 195, 35 P. (2d) 162.

There is a conflict under the above authorities, as to whether an agent whose exclusive territory has been invaded or appropriated by his employer, should have his probable expenses, and his earnings in other employment, deducted from the total commissions lost. However, the "doctrine of mitigation of damages" is inapplicable in veterans' reemployment cases.

The "doctrine of mitigation of damages" has been rejected in favor of the "doctrine of constructive service" in nine states, to wit, Alabama, Arkansas, Massachusetts, Michigan, Mississippi, Montana, Pennsylvania, South Carolina and Louisiana. [Annotations: 8 *A. L. R.* 338, 5 LRA (NS) 453.] The Congress manifestly did not mean for awards of "loss of wages or benefits" to be measured by one doctrine in one district court, and by the other in another. There is nothing in the Act itself which, *per se,* indicates that the "loss of wages" is to be mitigated or diminished to any extent by earnings in other employment. And if the veteran has been ready and willing at all times, to serve in his former position, but has been unlawfully prevented from so doing by the employer, the "doctrine of constructive service" is equally or more applicable than the doctrine of mitigation.

That a veteran may have recouped his losses, in whole or in part, from other employment, not contributed to in any manner by the offending employer, is not a circumstance out of which the latter should be allowed to claim a benefit or windfall. Prima facie, a veteran's "loss of

wages" is the wage of the position to which he should have been restored, and inquiry as to the amount of his loss, should end at that point.

The doctrine of mitigation of damages in cases of wrongful discharge was evolved by the courts in pursuit of a "public policy." An employee wrongfully discharged must treat his discharge, although wrongful, as final, since the courts cannot restore him to employment; and, since it is "against public policy" for him to remain idle, he must seek employment elsewhere and thus diminish his damages. Such is the rationale of doctrine of mitgation. *McMullen v. Dickinson* (1895), 60 Minn. 156, 62 N. W. 120, 51 Am. S. R. 511; *Howard v. Daly* (1875), 61 N. Y. 362, 19 Am. Rep. 285. The rationale rejecting the doctrine is that it unjustly rewards an offending employer, and subsidizes breaches of employment contracts by employers. Annotation: 8 *A. L. R.* 347-349.

The rationale supporting the doctrine of mitigation is invalid, in the face of the courts' *new powers created* by, and *new public policy* declared in, the reemployment provisions. A veteran unlawfully refused reemployment is not bound to treat the refusal as final, the courts are not powerless to compel his reinstatement, and the government furnishes him investigatorial and attorneys' assistance, all to the end that the declared public policy, that he shall not be unlawfully denied reemployment, may be given effect.

When applied in such cases, the doctrine of mitigation is a subsidization of law violators, projected gratuitously

into a new field, in the face of a public policy adopted by the nation in defense of its very existence. It ought not to be indulged by the federal district courts in reemployment cases; especially in view of the fact that the equally logical doctrine of constructive service, already adhered to by many courts, is ready at hand to serve the *new public policy* that veterans shall be reemployed, mandatorily or otherwise, in their former positions.

Appellant, therefore, submits that he has suffered a compensable loss of wages and benefits, as shown by the proof, up to September 1, 1946; and that, since he has always been ready and willing to serve the appellees in his former territory, and has been prevented from doing so solely by reason of their unlawful conduct, he should be compensated for his interim loss in an amount equal to what he would have received at his former rate of commissions on sales made in his former territory since March 9, 1946.

Upon the remand, if ordered, the District Court should be instructed that it is within that Court's discretion to refuse to diminish appellant's compensable loss of wages by the amount of his earnings in other employment, or by the amount of possible expenses he would have incurred in covering his former territory; and that it was error for the District Court to find as a fact, on the proof adduced at the trial, that the appellant had suffered either no "loss of wages or benefits," or a less such loss, than is indicated above.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be reversed. Appellant was clearly entitled to the benefits of the reemployment provisions; the refusal to restore him to his former territory and rates of commission was clearly unlawful; and the offer of the "city" territory did not satisfy the appellees' reemployment obligations to the appellant, either in law or fact. Therefore, appellant should be ordered properly restored by the appellees, and they should be further required to compensate him for his loss of wages and benefits measured under the doctrine of construction service, without diminution for possible traveling expenses or earnings in other employment.

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No. 11,544

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MILTON R. BROWN,

Appellant,

vs.

M. R. LUSTER AND A. M. LUSTER, partners doing business in the partnership name, SUNBEAM FURNITURE COMPANY,

Appellees.

BRIEF FOR APPELLEES.

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TOPICAL INDEX

PAGE

Jurisdiction 1

Statutes involved 1

Statement of the case 2

Questions involved 5

Summary of argument 6

Argument 8

I.

The appellant prior to his entry into military service did not hold a "position in the employ" of appellees within the meaning and intent of Section 8 of the Selective Training and Service Act of 1940, as amended, and is therefore not entitled to the benefit of the re-employment provisions thereof 8

A. The language "position in the employ of a private employer," as used in and intended by the Act does not include nor apply to an "independent contractor" 8

B. The appellant's status was that of an "independent contractor" and the District Court's finding to this effect was substantially supported by the evidence 11

II.

Appellees' good faith offer to grant to appellant the exclusive salesmanship of appellees' products in the city of Los Angeles constituted an offer to restore appellant to a "position of like seniority, status and pay" and thereby fulfilled their obligations under the re-employment provisions of the Act 14

III.

Appellant has suffered no damage for loss of commissions or profits contemplated by Section 8(e) of the Selective Training and Service Act of 1940, as amended 18

Conclusion 21

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bolander et al. v. Godsil et al., 116 F. (2d) 437	14
California Empl. Comm. v. Los Angeles Down Town Shopping News Corp., 24 Cal. (2d) 421, 150 P. (2d) 186	11
Dacey v. Bethlehem Steel Co., 66 F. Supp. 161	8, 19
Donlon Bros. v. Ind. Acc. Comm., 173 Cal. 250, 159 Pac. 715	12
Fishgold v. Sullivan Drydock and Repair Corp., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 960	8
Flickenger v. Ind. Acc. Comm., 181 Cal. 425, 184 Pac. 851	12
Ford v. United States, 273 U. S. 593, 71 L. Ed. 793, 47 S. Ct. 531	10
Frank v. Tru-Vue Ins., 65 F. Supp. 220	9
Green v. Soule, 145 Cal. 96, 78 Pac. 337	11
Houghton v. Texas State Life Insurance Co., 68 F. Supp. 21	19
James McClatchy Publishing Co., 16 Cal. App. (2d) 131, 60 P. (2d) 342	12
Kay v. General Cable Corp., 144 F. (2d) 653	8, 9, 18
Levine v. Berman (C. C. A. 6, May 6, 1947)	17
Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 Pac. 178	11
McClayton v. W. B. Cassel Co., 66 F. Supp. 165	8
McMillan v. Montecito Country Club, 65 F. Supp. 240	9
Moody v. Ind. Acc. Comm., 204 Cal. 668, 269 Pac. 542, 60 A. L. R. 299	11
Morgan v. Wheland Co., 66 F. Supp. 439	15
Occidental Life Insurance Co. v. Thomas, 107 F. (2d) 876	14
Rosenbaum v. Cico Steel Products Corp., D. C., Dist. of Columbia, April, 1947	9
Royal Indemnity Co. v. Ind. Acc. Comm., 104 Cal. App. 290, 285 Pac. 912	12
Salter v. Becker Roofing Co., 65 F. Supp. 633	20

PAGE

Schultz v. Town of Lakeport, 5 Cal. (2d) 377, 55 P. (2d) 485, 108 A. L. R. 1168 19

Tipper v. Northern Pac. Ry. Co., 62 F. Supp. 853 8

United States v. Standard Oil Co., 258 Fed. 697 12

United States v. U. S. F. & G. Co., 236 U. S. 512, 59 L. Ed. 69, 35 S. Ct. 298 19

STATUTES

Act of August 6, 1946, Chap. 936 (60 Stat. .....) 2

Civil Code, Sec. 2295 11

Federal Rules of Civil Procedure, Rule 52a 14

Judicial Code, Sec. 128(a) First (28 U. S. C., Sec. 225(a) First) 1

Service Extension Act of 1941, Sec. 7 (50 U. S. C. A., App., Sec. 357, 55 Stat. 627, 58 Stat. 799) 2

Selective Training and Service Act of 1940, Sec. 8 (50 U. S. C. A., App., Sec. 308, 54 Stat. 890, 50 Stat. 724, 58 Stat. 798, 60 Stat. 301) 1

Selective Training and Service Act of 1940, Sec. 8(b) 2, 7, 14, 21

Selective Training and Service Act of 1940, Sec. 8(c) 2, 7, 21

Selective Training and Service Act of 1940, Sec. 8(e) (50 U. S. C. A., App., Sec. 308(e)) 1, 2, 7, 21

Selective Training and Service Act of 1940, Sec. 16(b) (50 U. S. C. A., App., Sec. 316(b), 54 Stat. 897, 59 Stat. 166, 60 Stat. 181) 2

TEXTBOOKS

15 American Jurisprudence, p. 420 19

27 American Jurisprudence, p. 486 12

20 American Law Reports, p. 763 12

13 California Jurisprudence, p. 1020 12

30 California Law Review, pp. 57, 63 12

PAGE

25 Corpus Juris Secundum, p. 499 19

42 Corpus Juris Secundum, p. 639 12

Handbook of the Veterans Assistance Program of the Selective Service System, Sec. 301.7 15

Restatement of the Law of Agency, Sec. 1 11

Restatement of the Law of Agency, Sec. 220 (2) (a) 11

Restatement of the Law of Contracts, Sec. 336 19

Williston on Contracts, Sec. 1359 19

No. 11,544

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MILTON R. BROWN,

Appellant,

vs.

M. R. LUSTER AND A. M. LUSTER, partners doing business in the partnership name, SUNBEAM FURNITURE COMPANY,

Appellees.

BRIEF FOR APPELLEES.

Jurisdiction.

(a) The District Court had jurisdiction over this matter by virtue of Section 8 (e) of the Selective Training and Service Act of 1940, as amended (50 U. S. C. A., App., Sec. 308(e));

(b) This Court has jurisdiction by virtue of the provisions of the Judicial Code, Section 128(a) First (28 U. S. Code, Sec. 225(a) First).

Statutes Involved.

The applicable statutes involved include:

(a) Section 8 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. A., App., Sec. 308; 54 Stat. 890; 50 Stat. 724; 58 Stat. 798, and 60 Stat. 301, 341);

(b) Section 16(b) of said Act, as amended. (50 U. S. C. A., App., Sec. 316(b); 54 Stat. 897; 59 Stat. 166, and 60 Stat. 181, 342); and

(c) Section 7 of the Service Extension Act of 1941, as amended. (50 U. S. C. A., App. Sec. 357; 55 Stat. 627; 58 Stat. 799; and Act of Aug. 6, 1946, Chap. 936, 60 Stat. .....).

Section 8 (b, c. and e) of the Selective Training and Service Act of 1940, *supra,* contains the statutory language which primarily concerns the Court for purposes of this appeal. The pertinent portions thereof are quoted in appellant's brief at pages two and three.

Statement of the Case.

A complete and detailed statement of the case, including pleadings, evidence, specification of error etc., is contained in appellant's brief (pp. 13-27). No useful purpose is served in repeating same or parts thereof other than to comment upon, controvert, or to clarify and add to certain statements made therein by appellant with respect to the evidence.

1. Although Appellant refers to himself as a salesman in the "out of town" territory from December, 1937 to February 26, 1943, and claims to have represented Appellees alone after May-June, 1942 (App. Br. p. 13), it is noteworthy that:

a. Appellant acted as appellees' salesmen in the "out of town" territory only from April, 1942 to February 26, 1943. [R. pp. 3, 24.]

b. That while travelling and acting as appellees' salesman during the above period of time, appellant *had the*

unrestricted right to represent other employers and sell their lines simultaneously and at the same time he sold appellees' products. [R. p. 82.]

c. While appellant contends that the Charles S. Brown company connection ended in May-June, 1942 (App. Br. p. 13), Charles S. Brown testified that appellant was paid commissions by his company even after November 30, 1942. [R. p. 99.]

2. Appellant states that possibly $25,000.00 worth of business had been cancelled by reason of appellees' inability to make delivery of goods. (App. Br. p. 16.) Such statement is unsupported by any proof, is mere opinion, and irrelevant to the issues presented for appeal. For as admitted, commissions were payable only upon shipment and delivery of merchandise ordered [R. pp. 24, App. Br. pp. 24, 54, 64-66.] Hence appellant could not logically claim any commissions whatsoever on cancelled orders, even assuming that there were such cancellations.

3. Appellant's reference to the earnings of Ben Harris (App. Br. p. 16) fails to take into account that even Mr. Harris' commissions were subject to substantial reduction by reason of travelling expenses incurred. Under any or all circumstances, such earnings are no basis or criteria of judging or determining what the appellant could have earned for the same period of time, for, as the District Court so aptly stated:

> "That leads us largely in a field of speculation and again you are confronted with the personal and human element of two salesmen, one of whom might go in the same territory and sell ten times as much merchandise as the other." [R. p. 116.]

4. Appellant stresses critically that the District Court in its oral opinion adhered to the figures in the answer with respect to appellant's earnings, notwithstanding that the parties had stipulated that they were incorrect and that the correct figures appeared on Exhibits "B" and "C." (App. Br. p. 17.) It would appear that the Court's reference to the figures in the answer was inadvertent, unintentional and harmless error. For immediately after such reference, the Court in its oral opinion, accurately and correctly referred to the commissions paid to the appellant in accordance with the said exhibits. [R. p. 114.]

5. While the appellant, both at the time of trial [R. pp. 101-104] and in his brief (App. Br. pp. 17-18) attempts to so arrange and manipulate the amounts and periods of time for which commissions were paid to appellant so as to appear and lead one to infer that appellant had been earning in excess of $600.00 per month, it is submitted that such inference or conclusion is misleading, inaccurate and untrue. The facts with respect to the earnings of appellant are as indicated on exhibit "B" and as stated in the Court's opinion, as follows:

> "In 1941 the total was $282.44 or an average of $23.54 a month. In 1942 the total was $1510.38 or an average of $125.86 per month. In 1943 the total for five months was $1168.60 or an average of $233.72 per month. That is pro rated on the five month period and of course from this would be deducted the expense." [R. p. 114.]

6. By the Appellant's own testimony and admission, his expenses amounted to from $50.00 to $75.00 per week, no part of which were assumed by appellees. [R. pp. 73-74.]

Questions Involved.

Appellees submit that based on the evidence, the District Court's oral opinion, the Judgment, Findings of Fact and Conclusions of Law, there is but one crucial though determinative question presented for purposes of this appeal, namely:

I.

DID THE APPELLANT MILTON R. BROWN PRIOR TO HIS ENTRY INTO MILITARY SERVICE HOLD A POSITION "IN THE EMPLOY" OF APPELLEES WITHIN THE MEANING AND INTENT OF SECTION 8 (b, c, e) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, SO AS TO BE ENTITLED TO THE BENEFITS OF THE RE-EMPLOYMENT PROVISIONS THEREOF?

As stated by the District Court in its oral opinion, "if the petitioner was an employee of the respondent he was entitled to reinstatement. If the petitioner was an independent contractor he was not entitled to be reinstated in the position he held." [R. p. 115.]

Assuming, and in the event that the Court finds that the appellant did hold "a position in the employ" of appellees and by reason thereof was a person entitled to the protection of the Act referred to *supra,* two additional questions are presented for purposes of this appeal:

II.

DID THE GOOD FAITH OFFER ON THE PART OF THE APPELLEES TO GRANT TO APPELLANT THE EXCLUSIVE SALESMANSHIP OF THEIR PRODUCTS IN THE CITY OF LOS ANGELES CONSTITUTE AN OFFER TO RESTORE APPELLANT TO A POSITION OF "LIKE SENIORITY, STATUS AND PAY" AND THUS COMPLY WITH THEIR STATUTORY OBLIGATION TO APPELLANT?

III.

DID APPELLANT INCUR OR SUFFER ANY DAMAGE FOR LOSS OF COMMISSIONS OR PROFITS AS CONTEMPLATED BY SECTION 8 (e) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED?

Summary of Argument.

Appellant has contended that the "District Court's principal reliance was placed on the opinion in Levine v. Berman (D. C., N. D., Illinois, 1946), as indicated by the reference thereto, in the Court's oral opinion." (App. Br. p. 28.) An examination of the reference to this case reveals that as a matter of fact, the District Court placed no reliance whatsoever on that case. The Courts referred to the case by way of comment when it briefly discussed the question of whether or not the offer on the part of appellees to place the appellant in the position of salesman for the city of Los Angeles, was a position of "like seniority, status and pay" as the one previously held by appellant.

The Court's language reads:

> "An interesting case in this connection is Levine v. Berman decided May 8, 1946 in the northern district of Illinois." [R. p. 116.]

Appellees contend that:

I.

The Appellant Milton R. Brown prior to his military service did not hold 'a position in the employ' of appellees within the meaning and intent of Section 8 (b, c, e) of the Selective Training and Service Act of 1940, as amended, and is therefore not entitled to the benefit of the re-employment provisions thereof.

A. The words "position in the employ of a private employer" as used in and intended by the Act do not include nor apply to an "independent contractor."

B. The appellant's status was that of an "independent contractor" and the District Court's finding to this effect was substantially supported by the evidence.

Assuming, and in the event that the Court reverses the District Court in finding that appellant did hold "a position in the employ" of appellees, it is further submitted that:

II.

Appellees' offer in good faith to grant to appellant the exclusive salesmanship of their products in the city of Los Angeles, constituted an offer to restore appellant to a position of "like seniority, status and pay," and thus fulfilled their obligation under the Act.

III.

Appellant has suffered no damage for loss of commissions or profits contemplated by Section 8(e) of the Selective Training and Service Act, of 1940, as amended.

ARGUMENT.

I.

The Appellant Prior to His Entry Into Military Service Did Not Hold a "Position in the Employ" of Appellees Within the Meaning and Intent of Section 8 of the Selective Training and Service Act of 1940, as Amended, and Is Therefore Not Entitled to the Benefit of the Re-Employment Provisions Thereof.

A. The Language "Position in the Employ of a Private Employer", as Used in and Intended by the Act Does Not Include Nor Apply to an "Independent Contractor."

Appellees have no quarrel with the Court's duty to give a liberal construction and interpretation to the re-employment provisions of the Selective Training and Service Act of 1940, as amended, so as to effectuate its purposes. (*Kay v. General Cable Corp.* (3 C. C. A. 1944), 144 F. (2d) 653, 656; *Fishgold v. Sullivan Dry-dock and Repair Corp.* (1946), 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 960; *McClayton v. W. B. Cassel Co.,* D. C., Md., 1946, 66 F. Supp. 165.) Appellees contend, however, that such liberal construction should not be carried to the point of doing violence to the language of the act itself. (*Dacey v. Bethlehem Steel Co.,* D. C., Mass. 1946, 66 F. Supp. 161; *Tipper v. Northern Pac. Ry. Co.,* D. C. Wash. 1945, 62 F. Supp. 853.)

It is significant that the Act does not define or explain what specifically was intended by Congress when it used the language "a position in the employ of a private employer." Perhaps the clearest and best interpretation of

the intent of Congress in using such expression is contained in the case of *Kay v. General Cable Corporation* (3 C. C. A. 1944), *supra,* 144 F. (2d) 653, as follows:

> "The status which the statute protects is 'a position * * * in the employ of an employer,' an expression evidently chosen with care. The word "employee" was not used. While it may be assumed that the expression which was adopted is roughly synonymous with "employee," it unmistakably includes employees in superior positions and those whose services involve special skills, as well as ordinary laborers and mechanics. *Of course, the words are not applicable to independent contractors,* but except for casual or temporary workers, who are expressly excluded, they cover every other kind of relationship in which one person renders regular and continuing service to another." (Italics added for emphasis.) (Quoted with approval in *McMillan v. Montecito Country Club* (1946), 65 F. Supp. 240, p. 242.)

"Independent Contractors," in accordance with the foregoing interpretation have been held to be outside the scope of re-employment provisions of the Selective Training and Service Act of 1940, as amended. (*Frank v. Tru-Vue Ins.* (1946, 65 F. Supp. 220, where facts and circumstances of employment relationship bore a striking similarity to those of the instant case; see also *Rosenbaum v. Cico Steel Products Corp.,* D. C., Dist. of Columbia, April, 1947.)

It is submitted that the exclusion of "independent contractors" from the scope and benefit of the Act, is correct both from the standpoint of principle and logic. If Congress had intended to include "independent contractors," it is reasonable to assume that it would have so

expressly provided. The oft quoted maxim *"Expressio Unius est exclusio Alterius"* (Expression of one thing is exclusion of another) is applicable to the statutory language used. (*Ford v. U. S.*, 273 U. S. 593, 71 L. Ed. 793, 47 S. Ct. 531.) To read any other interpretation into the statutory expression is to strain the ordinary and reasonable meaning of the language used.

As an "independent contractor," a veteran, after his discharge from military service is as free to utilize his abilities and contract his services as he was prior to military service, and in this respect at least, he is not and cannot be prejudiced by any action of a person or persons for whom he may have performed a job or a series of jobs in refusing to restore him to such job or jobs. As a matter of economic reality, "independent contractors" can and do perform services simultaneously for any number of employers without restriction. To assert that each and every employer of the services of an "independent contractor" is bound by the Act to restore such "independent contractor" to his former job would have the practical effect of imposing a penalty on the employers and of creating chaos and confusion in our economic society. It would appear much more probable that Congress for very good and sound economic reasons did not include "independent contractors" within the provisions of the Act, and it is submitted that neither public policy nor the broadest possible application or interpretation of the Act permits such inference or conclusion.

B. The Appellant's Status Was That of an "Independent Contractor" and the District Court's Finding to This Effect Was Substantially Supported by the Evidence.

Contrary to appellant's argument that the "word employee, in its broadest connotation, includes an 'independent contractor'" (App. Br. p. 31), appellees submit that such contention is contrary to law and unsupported by case or authority.

The distinction between an agent or employee on the one hand, and an independent contractor is well settled in law. An agent or employee is "one who represents another, called the principal, in dealings with third persons." (*Cal. Civil Code* #2295, Rest. Agency #1.) An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. (*Green v. Soule* (1904), 145 Cal. 96, 99, 78 Pac. 337; *Moody v. Industrical Acc. Comm.* (1928), 204 Cal. 668, 269 Pac. 542, 60 A. L. R. 299; *Calif. Empl. Comm. v. Los Angeles Down Town Shopping News Corp.* (1944), 24 Cal. (2d) 421, 150 P. (2d) 186.)

In determining whether an individual is an employee or an independent contractor, the most significant factor tending to show employment is the right of the employer to control the details of the work, and conversely, freedom from such control tends to establish the relationship of independent contractor. (*Rest.*, Agency #220 (2) (a); *Luckie v. Diamond Coal Co.* (1919), 41 Cal. App. 468, 183 Pac. 178; *Cal. Empl. Comm. v. Los Angeles Down Town Shopping News Corp.* (1944, 24 Cal. (2d)

421, 150 P. (2d) 186; 30 *Cal. Law Review* 57, 63; 27 *Am. Jur.* 486; 42 *C. J. S.* 639.) Nearly all contracts for the performance of work reserve to the employer a certain degree of control. But control in this connection means complete control or the full and unqualified right to control and direct details of or means by which the work is to be accomplished. (13 *Cal. Jur.* 1020; *Flickenger v. Industrial Acc. Comm.*, 181 Cal. 425, 184 Pac. 851; *James McClatchy Publishing Co.*, 16 Cal. App. (2d) 131, 60 P. (2d) 342.

Appellant stresses that his employment contract was oral and terminable at will and that appellees had the power thereby to control the means and methods by which he would perform his services. (App. Br. p. 32.) By the same token, it may be argued that the appellant likewise could terminate his services and employment at his whim and fancy, thus negativing any control that appellees might have by virtue of this fact. Respectable authority has held that the right to discharge at will is just as consistent with the theory of an independent association as with the relationship of master and servant. (*Royal Indemnity Co. v. Industrial Acc. Comm.* (1930), 104 Cal. App. 290, 285 Pac. 912; 20 *A. L. R.* 763; *U. S. v. Standard Oil Co.* (1919), 258 Fed. 697; *Donlon Bros. v. Ind. Acc. Comm.* (1916), 173 Cal. 250, 159 Pac. 715.) Under any or all circumstances, it is submitted that the right to discharge at will is not controlling, but is merely one factor to be weighed along with other facts and circumstances of each individual case.

In the instant case, there is abundant undisputed evidence to support the correctness of the District Court's finding to the effect that Appellant's status was that of

an independent contractor. Appellant was paid on a commission basis. [R. p. 52.] He was free to solicit orders in whatever time and manner he chose and from whatever customers he selected. [R. pp. 79-80.] He determined his own hours and place of work, his sales routes, and employed whatever methods of salesmanship he desired. [R. pp. 79-82, 57.] He was not required to spend any particular time in his sales work. [R. p. 57.] Appellant had the unrestricted right to sell articles manufactured by other companies and could perform any other work for other persons at the same time as he sold for appellees. [R. p. 82.] Appellant used his own private automobile, and paid for all of his own expenses incurred in the making of sales or solicitation of orders. [R. pp. 58, 73-74.] It was not necessary that appellant be at appellees' office on any particular day or for any particular hours, and his visits to appellees' place of business were always informal and voluntary. [R. pp. 79, 106.] There was no sales quota that appellant had to satisfy or fulfill. [R. p. 67.] There was no withholding of social security tax, unemployment compensation, or any moneys whatsoever, from appellant's commissions.

The foregoing facts very clearly and overwhelmingly indicate that the appellant had exercised his own discretion with complete freedom in performing his services; that appellees exercised no direction or control over the manner in which appellant chose to perform his work, and appellant was responsible to appellees only as to the results of his work.

It follows that the finding of the District Court to the effect that appellant was an independent contractor was

correct and well substantiated by the evidence. And for purposes of this appeal, such finding is presumptively correct and should not be set aside nor disturbed unless clearly erroneous. (*Federal Rules of Civil Procedure,* Rule 52a; *Bolander et al. v. Godsil et al.* (9 C. C. A.), 116 F. (2d) 437; *Occidental Life Insurance Co. v. Thomas,* (9 C. C. A.), 107 F. (2d) 876.)

II.

Appellees' Good Faith Offer to Grant to Appellant the Exclusive Salesmanship of Appellees' Products in the City of Los Angeles Constituted an Offer to Restore Appellant to a "Position of Like Seniority, Status and Pay" and Thereby Fulfilled Their Obligations Under the Re-Employment Provisions of the Act.

Section 8(b) of the Selective Training and Service Act requires that:

> "If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employers circumstances have so changed as to make it impossible or unreasonable to do so * * *."

The language of the statute is in the disjunctive, and the natural and reasonable interpretation would seem to be that a restoration to either his former position or to a position of like seniority, status and pay, would satisfy the employer's obligation under the statute. Of course, if the employer's circumstances have so changed as to make it impossible or unreasonable to do either, the employer is relieved from such responsibility entirely. It is submitted that any other interpretation strains and does

violence to the statutory language and its clear intention.

The words "a position of like, seniority, status and pay," have been authoritatively construed to mean "a position, which, though not necessarily identical in every respect, is substantially equivalent to the veteran's former position on the basis of seniority, status and pay." (*Section 301.7, Handbook of the Veterans Assistance program of the Selective Service System.*) It has also been held that "position" within the meaning of this section means the employment and not the particular job the employee was performing. (*Morgan v. Wheland Co.*, D. C. Tenn. 1946, 66 F. Supp. 439.)

It remains therefore to establish that appellees' offer to restore appellant to the exclusive salesmanship of the Los Angeles territory constituted a position of "like seniority, status and pay." It would appear that such offer was unquestionably a position of like seniority and status. Appellant's primary objection is that the territory of Los Angeles (in his opinion) was and is not so desirable from the standpoint of pay. [R. pp. 71-72.] It should be observed however, in this respect, that the appellant had no personal knowledge or acquaintance with either the "city" or so-called "out of town" territory for approximately three and one half (3½ yrs.) years immediately preceding his petition, and his information as to the comparative potential earnings in the two territories as of the time of his petition was hearsay. [R. p. 104.]

From the standpoint of "pay" appellant would have received the same commissions on goods, wares and merchandise sold as he did prior to his entry into military service, and it is submitted that this is all that is required

by the Act of the employer in restoring a veteran to his former position or to a position of like seniority, status and pay. It is quite clear from the record, that when substracting and deducting appellant's admitted expenses of from $50.-$75.00 per week [R. pp. 73-74], from his commissions and earnings [See Exhibit "B," R. pp. 17-19], appellant operated at a substantial net loss. It is probable ,in view of the marked rise in the cost of living since 1943, that appellant's expenses would now be proportionately higher if he were to travel the same territory as he did previously. But Appellant is now expecting and insisting that the earnings of the salesman who replaced him, Ben Harris, is the proper basis and criteria for judging what he would have earned if he were restored to his former territory. Such a conclusion is in the realm of speculation. The District Court's proper answer to such contention was:

> "The Court does not believe that is a proper comparison and not as logical a comparison as the commissions received by the petitioner himself in the same territory. One salesman may be much more active, agressive, and be a much better salesman than another." [R. p. 112.]

The District Court took judicial notice of the unprecedented expansion of building in the Los Angeles area since petitioner entered the armed services in February, 1943, the marked increase in population and number of dwelling units in the community. [R. p. 117.] The Appellee Melvin R. Luster testified from personal knowledge that the Los Angeles territory was just as desirable as the "out of town" territory, and appellees' method of operation was assigned as a good and meritorious reason there-

for. [R. pp. 78-79.] These facts together with other evidence before the Court, were ample to support the Court's merely conditional finding that if appellant had accepted the territory of Los Angeles, he would have been restored to a position of "like seniority status and pay" similar to that held by petitioner prior to his entry into military service." [Finding 6, R. p. 26.]

Appellant places much emphasis on the case of *Levine v. Berman* (C. C. A. 6. May 6, 1947), and insists that under the foregoing decision, it is mandatory under the act to restore a salesman to his exact and identical sales territory. (App. Br. pp. 34, 37-38.) It is submitted that the *Levine* case, *supra*, is not controlling, and can be distinguished from the instant case upon its facts. In that case the facts were that prior to his entry into military service the salesman in question had an exclusive territory at a commission of 10% and with no limitation on the amount of merchandise which could be sold. During the war years, the employer had discontinued certain of its lines. Upon his discharge from military service, the veteran was offered employment in a smaller territory and at a reduced commission of 7½% on a limited sales allotment. The District Court held that re-employment in the former territory was unreasonable due to the changes in the employer's circumstances, and that the employer's offer to restore the veteran to another territory with changed terms fulfilled his obligations under the Act. The Circuit Court in ordering the restoration of the veteran to his former territory merely held that the District Court's finding did not show that re-employment of the veteran in the former territory and at the same commission was unreasonable.

III.

Appellant Has Suffered No Damage for Los of Commissions or Profits Contemplated by Section 8 (e) of the Selective Training and Service Act of 1940, as Amended.

It was held in the case of *Kay v. General Cable Corp.*, D. C., N. J., 1945, 59 F. Supp. 358, that the provision of subsection (3) of this section to the effect that an employer wrongfully denying reinstatement to a veteran shall compensate him for loss of wages or benefits because of such action is not designed as a penalty, but primarily to aid a veteran who, until he has been reinstated, is unable to establish himself as a wage earner. It was also held in that case that where a veteran, notwithstanding an employer's refusal to restore him to his former position as required by this section, is able to pursuse his trade or profession and actually does so, the veteran's situation is not of the type which this section is primarily intended to alleviate, and compensation should be determined accordingly, although the veteran may remain within the protection of this section.

Appellant argues that the doctrine of "mitigation of damages" is inapplicable and ought not be indulged in by the Courts in re-employment cases. (App. Br. pp. 41-43.] It is submitted, that if the Court were to accept this argument, it would do so in direct conflict with the pronounced policy and purpose of the Act as well as with well settled and accepted authority to the contrary.

The overwhelming weight of authority favors and supports the doctrine of "mitigation of damages," sometimes also referred to as "the rule of avoidable consequences."

One who is injured by wrongful or negligent act of another, whether by tort or breach of contract is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage. *Williston on Contracts,* section 1359; *Restatement of Contracts,* Section 336; 15 *Am. Jur.* 420; 25 *C. J. S.* 499; *United States v. U. S. Fidelity and G. Co.,* 236 U. S. 512, 59 L. Ed. 69, 35 S. Ct. 298; *Schultz v. Town of Lakeport,* 5 Cal. (2d) 377, 55 P. (2d) 485, 108 *A. L. R.* 1168.) Nothing in the Act indicates that it was designed to permit that which was intended as a shield for a veteran's economic protection and rehabilitation to be converted by him as a sword to arbitrarily impose a severe penalty on employers, who irrespective of good faith and intentions have wrongfully failed to restore the veteran to his former position.

Accordingly, in the interpretations given the Act, it has been held that a veteran seeking a sum equivalent to loss of wages on the ground that the employer wrongfully refused to re-employ him after his discharge, must have made a bona fide attempt to secure other work to mitigate damages. *Houghton v. Texas State Life Insurance Co.,* D. C., Texas, 1947, 68 F. Supp. 21.) It has likewise been held that the provisions of the section applicable to compensation to a veteran for loss of wages suffered are economic rather than penal, and hence an employer is entitled to credit earnings made by the veteran during the time the employer is liable for compensation for refusing to re-employ the veteran. (*Dacy v. Bethlehem Steel Co.,* D. C., Mass., 1946, 66 F. Supp. 161.) So a discharged veteran, who should have been restored to his former

employment as of January 1, 1946, was entitled to recover from his employer the amount which he would have received in such employment between January 1 and June 1, 1946, the date when the employer was ordered to reemploy veteran, *but less rehabilitation pay received from the United States and money earned in other employment between January 1 and June 1, 1946.* (Italics added.) (*Salter v. Becker Roofing Co.,* D. C., Ala., 1946, 65 F. Supp. 633.)

It has been heretofore established that appellant, for the entire period of time during which he acted as appellees' salesman, from 1941 to 1943, operated at a substantial net loss. In contrast, after refusing to accept the Los Angeles territory offered him by appellees, appellant worked for the Los Angeles Chair Co. at a salary of $150.00 per week or in excess of $600.00 per month and there was evidence that he received additional compensation for miscellaneous expenses, as he testified that he had received $100.00 for such purpose during September, 1946. [R. pp. 60-61.] From April, 1946 to and including the date of the trial, appellant would thus have earned in excess of $3000.00 net, without deduction of any kind. Yet the appellant would now wish the Court to speculate and assume that he would have earned the same or greater amount that appellees' salesman in his former territory, Mr. Harris, had earned for the same period of time, and that he is therefore entitled to the difference as compensation or damages. For obvious reasons, such reasoning is without merit.

The District Court was well fortified in logic, principle and authority in holding that appellant suffered no loss of "wages or profits" within the meaning of the act.

Conclusion.

From the evidence, the District Court was correct in finding and holding that appellant's status was that of an independent contractor. As such, appellant was not in a "position in the employ" of appellees prior to his military service and by reason thereof not entitled to the re-employment benefits of Section 8 (b, c, e) of the Selective Training and Service Act of 1940, as amended. Assuming and in the event that the Court reverses the District Court in finding that appellant was "in the employ" of appellees and thus entitled to the protection of the Act, it is submitted that appellees in good faith offered to grant to appellant the exclusive salesmanship of their products in the Los Angeles territory, and that such offer constituted a position of "like seniority, status and pay" and fulfilled appellees' obligation under the Act. The evidence and authority clearly establish that under any or all circumstances, appellant suffered no loss of wages or profits attributable to appellees or recoverable under the Act.

It is respectfully submitted, by reason of the foregoing, that the judgment of the District Court, should be affirmed.

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No. 11,545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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Subject Index

Page

Jurisdictional statement 1

Offense charged, plea, verdict and sentence..... 1

Statement of facts 2

Evidence conflicting as to who struck first blow and progress of fight 5

Essential evidence as to the character of the alleged weapon was withheld from the grand jury 7

Photographs taken of Rowley's head 9

Statement of points relied upon 10

Argument 12

First point raised: 1. That the trial court erred in giving to the jury Instruction No. 4D 12

(a) The court's instruction (4D) that it was no defense to the crime charged in the indictment or to the included crime of assault, that the complaining witness may have voluntarily entered into a fight with appellant, each attempting to hit and injure the other with his fists, is an erroneous statement of law 13

(b) The court's Instruction 4D wrongfully assumed that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists, whereas these material facts were in issue, controverted and disputed and were matters to be determined by the jury 15

Second point raised: 2. The trial court erred in giving to the jury Instruction No. 4, wherein the court disclosed to the jury the lesser punishment which might be imposed by the court for a violation of the included offense of assault, and failed to indicate to the jury the greater punishment provided for the crime charged in the indictment, to wit, assault with a dangerous weapon 21

Third point raised: 3. That the trial court committed reversible error in failing to instruct the jury on the law

Page

of self-defense as applicable to the offense charged in the indictment and the included offense of assault 24

Fourth point raised: 4. That prejudicial error was committed in allowing photographs of the injured man's head to be introduced in evidence, exhibited to the jury and subsequently withdrawn from evidence. The only purpose of their introduction was to inflame and prejudice the jury against appellant 29

Fifth point raised: 5. That appellant was prejudiced in the presentation of his defense by the failure of the United States Attorney to disclose, prior to the trial, the precise theory as to the instrument or implement used by appellant in the alleged assault and by the erroneous rulings of the trial court thereon 33

Sixth point raised: 6. That the trial court was without jurisdiction of the offense charged on the ground that the indictment does not state facts sufficient to constitute a crime 34

The sufficiency of the indictment 35

The Sixth Amendment 36

A bill of particulars cannot cure a defective indictment..... 47

It is presumed that a defendant is ignorant of what is intended to be proved against him 50

An indictment pleading only the words of the statute is not sufficient in the case at bar 54

Implement defined 62

The United States Attorney withheld evidence from the grand jury and thereby prevented the grand jury from returning a valid indictment 66

Conclusion 73

Table of Authorities Cited

Cases

	Pages
Abney v. State, 123 Miss. 546, 86 So. 341	22
Allen v. Commonwealth, 245 Ky. 660, 54 S. W. (2d) 44	25
Amend v. Murphy, 69 Ill. 337	65
Armstrong v. U. S. (C.C.A. 9th), 5 Alaska Fed. 510, 41 Fed. (2d) 162	14
Asher v. State, 201 Ind. 353, 168 N. E. 456	20
Baker v. State, 109 Tex. Cr. App. 433, 5 S. W. (2d) 149	28
Barber v. State, 125 Miss. 138, 87 So. 485	18, App. ix
Bates v. State, 78 Fla. 672, 84 So. 373	17, App. iv
Baxter v. Chi. N. W. R. Co., 104 Wis. 307, 80 N. W. 644	32
Bean v. State, 58 Okla. Cr. R. 432, 54 Pac. (2d) 675	23
Bean v. State, 77 Okla. Cr. 73, 138 Pac. (2d) 563	59
Behrens v. State, 140 Neb. 671, 1 N. W. (2d) 289	25
Bethel v. State, 162 Ark. 40, 257 S. W. 740	22
Blake v. State, 147 Tex. Cr. App. 333, 180 S. W. (2d) 351	37, 51
Brickell v. State, 138 Tex. Cr. App. 101, 134 S. W. (2d) 262	26
Bridges v. State, 169 Ark. 335, 275 S. W. 671	17
Britton v. State, 95 Tex. Cr. R. 83, 253 S. W. 519	13
Brown v. State, 20 Ala. App. 39, 100 So. 616	32, 33
Bryant v. State, 205 Ind. 372, 186 N. E. 322	22
Burns v. State, 229 Ala. 68, 155 So. 561	14, 25
Burtnett v. U. S., 62 Fed. (2d) 452	17
Cadle v. State, 27 Ala. App. 519, 175 So. 327	33
Cobb v. State, 24 Ala. App. 358, 135 So. 417	14
Colby v. State, 57 Okla. Cr. 162, 46 Pac. (2d) 377	18, App. xi
Cole v. State, 15 Okla. Cr. 361, 177 Pac. 129	56
Collins v. State, 82 Tex. Cr. App. 24, 198 S. W. 143	26, 28
Collins v. United States, 253 Fed. 609 (C.C.A. 9th)	48
Commonwealth v. Saylor, 156 Ky. 249, 160 S. W. 1032	25
Commonwealth v. Switzer, 134 Pa. 383, 19 Atl. 681	23
Commonwealth v. Watson, 117 Pa. S. 594, 178 A. 408	19
Commonwealth v. White, 33 Ky. L. R. 70, 109 S. W. 324	61
Cirello v. Met. Express Co., 88 N.Y.S. 932	32
Daniel v. State, 67 Okla. Cr. 174, 93 Pac. (2d) 47	14
Daniels v. Hayward, 87 Mass. 43	65
Davidson v. Hannon, 67 Conn. 312, 34 Atl. 1050	64

Pages
Davis v. Anchor, etc. Co., 96 Ia. 70, 64 N. W. 687..... 64
Davis v. State, 214 Ala. 273, 107 So. 737..... 25
Dilburn v. State, 16 Ala. App. 371, 77 So. 983..15, 16, 17, App. iii
Dozier v. State, 12 Ga. App. 722, 78 S. E. 203.....25, 28
Driskill v. U. S., 24 Fed. (2d) 525 25
Duff v. Commonwealth, 297 Ky. 502, 180 S. W. (2d) 412 25
Duncan v. State, 30 Ala. App. 356, 6 So. (2d) 450..... 25
Dwyer v. State, 93 Fla. 777, 112 So. 62..... 17

Eggers v. Commonwealth, 195 Ky. 827, 243 S. W. 1023.... 13
Elliott v. State, 16 Ala. App. 464, 78 So. 633.....15, 16

Fightmaster v. Skoll, 231 Ky. 232, 21 S. W. (2d) 269..... 13
Flaxman v. Capitol City Press, 121 Conn. 423, 185 Atl. 417 65
Fletcher v. State, 2 Okla. Cr. 300, 101 Pac. 599..... 56
Fontana v. U. S., 262 Fed. 283 .....37, 51
Foster v. United States, 253 Fed. 481 (C.C.A. 9th)..... 48
Frank v. U. S. (C.C.A. 9th), 42 Fed. (2d) 623..... 14

Garrison v. Commonwealth, 236 Ky. 706, 33 S. W. (2d) 698 28
Gibson v. State, 89 Ala. 121, 8 So. 98 28
Glover v. Commonwealth, 260 Ky. 48, 83 S. W. (2d) 881.. 28
Goddard v. Chaffee, 84 Mass. 395 64
Gray v. Richardson, 313 Ill. App. 626, 40 N. E. (2d) 598
.....18, App. vi

Harris v. U. S., 104 Fed. (2d) 41 43
Hemphill v. State, 52 Okla. Cr. 419, 6 Pac. (2d) 450..... 51
Henderson v. State, 20 Ala. App. 124, 101 So. 88..... 16
Hendry v. U. S., 233 Fed. 5 16
Hubbard v. State, 196 Ind. 137, 147 N. E. 323..... 18
Huber v. U. S. (C.C.A. 9th), 4 Alaska Fed. 763, 259 Fed.
766 .....14, 24
Huff v. Commonwealth, 250 Ky. 486, 63 S. W. (2d) 606.... 28
Hughes v. State, 99 Tex. Cr. App. 244, 268 S. W. 960....
.....19, App. xiii
Hunnicut v. State, 131 Tex. Cr. 260, 97 S. W. (2d) 957....66, 70

In re Robinson, 206 Fed. 176 65

Jackson v. Commonwealth, 265 Ky. 458, 97 S. W. (2d) 21 28
Jackson v. U. S., 48 App. D. C. 272 17

Pages
Jarl v. United States, 19 Fed. (2d) 891 ..... 37, 44, 46, 49

Kinaid v. U. S., 96 Fed. (2d) 522 16
King v. State, 19 Ala. App. 153, 96 So. 636 15

Laguna v. Quinones, 23 P. R. R. 358 64
Lindsey v. U. S., 133 Fed. (2d) 368 20
Lowe v. Commonwealth, 298 Ky. 7, 181 S. W. (2d) 409 25
Lowenburg v. United States (C.C.A. 10th), 156 Fed. (2d) 22 ..... 37, 56
Lunsford v. State, 53 Okla. Cr. 305, 11 Pac. (2d) 539 18
Lynch v. United States, 10 Fed. (2d) 947 ..... 37, 51

Magnon v. U. S., 66 Fed. 151 64
Marsh v. State, 125 Ark. 282, 188 S. W. 815 17
Manley v. State, 138 Tex. Cr. App. 379, 136 S. W. (2d) 613 70
Martin v. Govt. of Canal Zone (C.C.A. 5), 81 Fed. (2d) 913 16
Matterson v. State, 142 Tex. Cr. App. 250, 152 S. W. (2d) 352 26
McAffee v. U. S., 105 Fed. (2d) 21 16
McAndrews v. People, 71 Colo. 542, 208 Pac. 486, 24 A.L.R. 659 ..... 17, App. iii
Meadows v. U. S., 82 Fed. (2d) 881 ..... 14, 15, 20
Miller v. U. S., 37 App. D. C. 138 ..... 22, 23
Mitchell v. State, 155 Ark. 413, 244 S. W. 443 22
Moody v. State, 11 Okla. Cr. 471, 148 Pac. 1055 58
Moore v. State, 53 Ga. App. 472, 186 S. E. 469 ..... 17, App. v
Morris v. State, 146 Ala. 66, 41 So. 274 14
Morzee v. State (Tex. Cr. App.), 51 S. W. 250 26
Murphy v. State, 130 Tex. Cr. App. 610, 95 S. W. (2d) 133 26
Myers v. United States, 15 Fed. (2d) 977 ..... 44, 46, 47, 49

Naftzger v. U. S., 200 Fed. 494 ..... 66, 69

Orr v. State, 146 Tex. Cr. App. 576, 177 S. W. (2d) 210 .. 26
Osius v. State, 96 Fla. 318, 117 So. 859 22

Parks v. State, 95 Tex. Cr. R. 207, 253 S. W. 302 61
Parman v. Lemmon, 119 Kan. 323, 244 Pac. 227, 44 A.L.R. 1500 65
Patrick v. Commonwealth, 234 Ky. 33, 27 S. W. (2d) 387 25
People v. Biella, 374 Ill. 87, 28 N. E. (2d) 111 18

Pages
People v. Browning, 302 Ill. App. 297, 23 N. E. (2d) 736.. 18
People v. Celmars, 332 Ill. 113, 163 N. E. 421.....18, App. vi
People v. Chartoff, 75 N.Y.S. 1088 22
People v. Delgado, 28 Cal. App. (2d) 665, 83 Pac. (2d) 512 17
People v. Haack, 86 Cal. App. 390, 260 Pac. 913.....17, App. xvi
People v. Harvey, 286 Ill. 593, 122 N. E. 138 .....18, App. viii
People v. Hunt, et al., 251 Ill. 446, 96 N. E. 220..... 71
People v. Kallista, 313 Ill. App. 321, 40 N. E. (2d) 105....
.....18, App. vi
People v. Lee Chuck, 74 Cal. 30, 15 Pac. 322 17
People v. Leslie, 9 Cal. App. (2d) 177, 48 Pac. (2d) 995....14, 25
People v. Marion, 28 Mich. 255 50
People v. Parish, 59 Cal. App. 302, 210 Pac. 633.....17, App. i
People v. Parretti, 234 N. Y. 98, 136 N. E. 306 18
People v. Rallo, 119 Cal. App. 393, 6 Pac. (2d) 516..... 25
People v. Santini, 221 App. Div. 139, 222 N.Y.S. 683..... 22
People v. Sherman, 264 App. Div. 274, 35 N.Y.S. (2d) 171 22
People v. Williams, 17 Cal. 142 .....17, App. xvi
People v. Woodcock, 52 Cal. App. 412, 199 Pac. 565..17, App. xvi
Perovich v. U. S., 205 U. S. 86, 27 S. Ct. 456..... 20
Phillips v. State, 190 Ind. 159, 129 N. E. 466..... 15
Pincolini v. U. S. (C.C.A. 9th), 295 Fed. 468..... 17
Pittman v. State, 84 Ark. 292, 105 S. W. 874..... 22
Pluckham v. Bridge Co., 104 App. Div. 404, 93 N.Y.S. 748 65
Ponkilla v. State, 69 Okla. Cr. 31, 99 Pac. (2d) 910..... 59

Ramirez v. State, 112 Tex. Cr. App. 332 23
Redwine v. State, 85 Tex. Cr. App. 437, 213 S. W. 636....
.....19, App. xiii
Richardson v. Commonwealth, 273 Ky. 321, 116 S. W. (2d)
639 28

Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 47
L.R.A. 691 32
Skelly v. State, 64 Okla. Cr. 112, 77 Pac. (2d) 1162 27
Smiley v. Commonwealth, 235 Ky. 735, 32 S. W. (2d) 51.. 25
Snyder v. State, 155 Ark. 479, 244 S. W. 746..... 22
Sorrells v. U. S., 287 U. S. 435 24
Starr v. U. S., 153 U. S. 614 17
State v. Andrews, 35 Ore. 388, 58 Pac. 765 19

Pages
State v. Arnett, 258 Mo. 253, 167 S. W. 526 28
State v. Brannon (W. Va.), 137 S. E. 649 20
State v. Bryant, 213 N. C. 752, 197 S. E. 530 27
State v. Cater, 100 Ia. 501, 69 N. W. 880 18
State v. Fredericks, 136 Mo. 51, 37 S. W. 832.....14, 28
State v. Hale, 71 Utah 134, 263 Pac. 86 51
State v. Hanna, 81 Utah 583, 21 Pac. (2d) 537.....19, App. xv
State v. Harrington, 61 Mont. 373, 202 Pac. 577.....18, App. xi
State v. Harrison, 225 N. C. 234, 34 S. E. (2d) 1..... 60
State v. Hatch, 57 Kan. 420, 46 Pac. 708..... 25
State v. Hatcher, 210 N. C. 55, 185 S. E. 435..... 16
State v. Johnson (Mo.), 234 S. W. 794 .....18, 20
State v. Johnson (S.D.), 17 N. W. (2d) 345 .....20, App. x
State v. Jones, 79 N. C. 630 25
State etc. v. Justice of Peace, etc., 102 Mont. 1, 55 Pac. (2d) 691 65
State v. Laura, 93 W. Va. 250, 116 S. E. 251 19
State v. Linville, 127 Ore. 565, 273 Pac. 338..... 14
State v. Lionetti, 93 N.J.L. 24, 107 Atl. 47 .....15, 18
State v. Mayer, 204 Ia. 118, 214 N. W. 710 22
State v. Mazur (Mo.), 77 S. W. (2d) 839.....18, App. ix
State v. McKenna, 24 Utah 317, 67 Pac. 815..... 50
State v. Miller, 43 Ore. 325 .....30, 31
State v. Newman, 101 W. Va. 356, 132 S. E. 728..... 19
State v. Pitman (N.J.), 119 Atl. 438 18
State v. Porter, 101 N. C. 713, 7 S. E. 902 .....60, 63
State v. Robertson, 191 S. C. 509, 5 S. E. (2d) 285..... 25
State v. Robichaux, 165 La. 497, 115 So. 728..... 25
State v. Robinson (Mo.), 182 S. W. 113 14
State v. Seymour, 49 Utah 285, 163 Pac. 789..... 19
State v. Stanford, 218 Ia. 951, 256 N. W. 650.....13, 26
State v. Stowe, 132 Mo. 199, 33 S. W. 799 .....66, 71
State v. Stewart (Mo.), 29 S. W. (2d) 120 18
State v. Tennant, 204 Ia. 130, 214 N. W. 708..... 22
State v. Thornhill, 188 La. 762, 178 So. 343 18
State v. Topham, 41 Utah 39, 123 Pac. 888.....50, 56
State v. Turnbo (Mo.), 267 S. W. 847 25
State v. Williams, 185 N. C. 685 27
Sturcz v. U. S., 57 Fed. (2d) 90 17

Pages

Supina v. State, 115 Tex. Cr. R. 56, 27 S. W. (2d) 198.... 19
Sutton v. United States, 157 Fed. (2d) 661.....38, 39, 41, 43, 44

Tarver v. State, 17 Ala. App. 424, 85 So. 855..... 17
Teel v. State (Tex. Cr. App.), 69 S. W. 531..... 26
Terry v. State, 21 Ala. App. 100, 105 So. 386..... 15
Thomas v. State, 68 Okla. Cr. 63, 95 Pac. (2d) 651..... 14
Thurogood v. State, 87 Tex. Cr. App. 209, 220 S. W. 337... 26
Tucker v. Commonwealth, 145 Ky. 84, 140 S. W. 73 25

U. S. v. Aurandt, 15 N. M. 292, 107 Pac. 1064..... 70
U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.....36, 55, 56
U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135..... 55
U. S. v. Ferranti, 59 F. Supp. 1003 .....37, 51
U. S. v. Hess, 124 U. S. 483, 8 S. Ct. 571 .....37, 55, 56
U. S. v. Koon Wah Lee, 6 F.R.D. 456 .....41, 52
U. S. v. Rhodes, 212 Fed. 513 .....66, 69, 70
U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819..... 36
Urban v. U. S., 46 Fed. (2d) 291 20

Vincent v. State, 153 Ga. 278, 112 S. E. 120.....17, App. v

Walls v. State, 32 Okla. Cr. 108, 240 Pac. 146.....18, App. xii
Ward v. U. S. (C.C.A. 9th), 4 Fed. (2d) 772..... 17
Webb v. Snow (Utah), 132 Pac. (2d) 114.....19, App. xiv
Weddel v. U. S., 213 Fed. 208 20
White v. Geneny, 47 Kan. 741, 28 Pac. 1011..... 65
White v. U. S. (C.C.A. 10th), 67 F. (2d) 71.....37, 49, 70
Wilhite v. Williams, 41 Kan. 288, 21 Pac. 256..... 65

Yeager v. State, 96 Tex. Cr. App. 124, 256 S. W. 914..... 26

Statutes

Complied Laws of Alaska, Section 4778 .....1, 2, 21, 22, 57

United States Constitution, Sixth Amendment 35, 36
28 U.S.C., Section 225, subdivision (a), First and Third and subdivision (d) 1
18 U.S.C.A. 556 .....35, 41, 43, 44, 57
28 U.S.C.A. 391 .....41, 43, 44, 57

Dictionaries

Page

Black's Law Dictionary, Third Ed. (1933), page 924..... 64
Bouvier's Law Dictionary, Rawle's Third Revision (1914) 64

Funk & Wagnalls College Standard Dictionary (1943).... 63

Webster's Collegiate Dictionary, 5th Ed. (1941) 63

No. 11,545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by the District Court of the United States for the Territory of Alaska, Third Division. The offense charged in the indictment is assault with a dangerous weapon, a violation of Section 4778, Compiled Laws of Alaska, and is punishable by imprisonment for a term exceeding one year. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

OFFENSE CHARGED, PLEA, VERDICT AND SENTENCE.

Appellant was charged in an indictment returned by the Grand Jury for the Territory of Alaska, Third

Division, with the crime of assault with a dangerous weapon upon one Frank Rowley in violation of Section 4778, Compiled Laws of Alaska. (T. R. 2.) He entered a plea of not guilty. After a trial by jury, he was found guilty as charged in the indictment. (T. R. 24.) Motions for a new trial (T. R. 24) and in arrest of judgment (T. R. 31) were denied (T. R. 36); appellant was thereupon sentenced to prison for a period of three years. (T. R. 38.) Notice of appeal was filed. (T. R. 39.)

STATEMENT OF FACTS.

The incident out of which the indictment arose occurred in Anchorage, Alaska, about 8:45 A. M. on July 30, 1946. (T. R. 48.) Appellant, at that time, was the owner of a salvage yard where second-hand equipment was sold. (T. R. 189.) The complaining witness, Frank Rowley, was an electrical worker and at this time was engaged in installing an electrical system in Mt. View, Alaska. (T. R. 171.)

Shortly before July 30, 1946, appellant visited Rowley at Mt. View, Alaska, and had a discussion with him about the purchase of a couple of war surplus generating plants. During this talk it developed that appellant owned an oil tank in which Rowley expressed an interest (T. R. 171, 172) and there was some discussion about the price of the oil tank.

On July 30, 1946, at about 7:30 A. M., Rowley, together with one Ken Hinchey, went to appellant's salvage yard in Anchorage, Alaska, for the purpose

of purchasing and taking away the oil tank. Appellant was not there at the time. (T. R. 173.) George Miles, an employee of appellant, arrived at the yard shortly thereafter. (T. R. 173.) Rowley told Miles that he wished to buy the tank for $150. (T. R. 248.) Miles replied that he thought this was a low price and asked Rowley whether he had talked to appellant about it. Rowley said he had not. Miles then suggested that Rowley see appellant about the price. (T. R. 248.) Rowley and Miles got into Rowley's pick-up truck and began to hunt for appellant. (T. R. 248.) They first went to appellant's house. He was not there. They went to the Alta Club (T. R. 190) and then circled back to appellant's house and entered the back yard from the alley in the rear of the house. (T. R. 190.) Dave Foote, appellant's truck driver and handyman, was in the back yard at the time. (T. R. 190, 248.)

Rowley and Miles entered the house through the rear door, crossed a hallway and knocked at a door leading to appellant's bedroom. (T. R. 181, 248.) Appellant came to the bedroom door and said, "What the hell is your hurry, can't you wait a few minutes?" (T. R. 248, 415.) Miles told appellant that Rowley was ready to take the oil tank from his junk yard, and that Rowley insisted that the purchase price was $150. (T. R. 191, 415.) Appellant maintained that the price of the tank was $250. (T. R. 191, 249, 416.) After some argument between them over the price, and after Miles left the house and went into the yard (T. R. 191, 249), appellant finally told Rowley that

the price was either $250 or nothing, and said: "Now, don't call me a liar in my own house". (T. R. 416, 192, 96.) Rowley stepped outside the rear door and replied: "You are a liar". (T. R. 416, 90, 96.) Appellant at that time was standing in the doorway of his house. (T. R. 90, 175.)

Miles testified that when he was five or six feet outside the door, he heard appellant tell Rowley that the latter could not argue with him in his own house. This was immediately after Miles had left the house. (T. R. 249.) Miles also heard appellant tell Rowley, "You can't call me a liar". (T. R. 192.) Furthermore, Rowley said something to appellant that Miles could not hear, but Miles did hear appellant immediately thereafter say, "Take off your glasses". (T. R. 249.) Rowley took off his glasses and laid them on a stove just outside the door. (T. R. 416.)

Appellant took off his glasses and put them on a box. (T. R. 90.) Both men put up their hands and started to spar. (T. R. 91, 416, 127, 279.)

At this time Miles and Foote were in the yard. Behind Rowley in the yard was a wood and trash pile (T. R. 78, Exhibits 1 to 4, T. R. 52-54) about two feet from the door of the house. (T. R. 227.) On the right of the yard, facing the alleyway, was a shed against which tools, implements and junk were strewn. (Exhibits 1 to 4, T. R. 52-54; 97.)

EVIDENCE CONFLICTING AS TO WHO STRUCK FIRST BLOW AND PROGRESS OF FIGHT.

There is a sharp conflict as to who struck the first blow. Appellant testified that Rowley struck first. (T. R. 416.) Rowley claimed that appellant struck first (T. R. 175); in this he was corroborated by Foote (T. R. 91) and Miles. (T. R. 192, 249.) Louis Strutz, who had driven into the alley for the purpose of picking up a carton from among rubbish in the alley (T. R. 254), testified that Rowley was facing appellant with clenched fists. (T. R. 279.)

The evidence is also conflicting as to the details of the altercation that followed. Appellant testified:

> "As he took off his glasses and laid them down, we were sparring around (demonstrating)—we were hitting at one another and I was fast getting out of breath, and there were two or three blows he struck me that would have been counted. And as he hit me, I hit him on the left side, which caused him to turn around. I hit him and give him a shove and he got on the ground. He started to get up and I stepped back with my foot behind my—I grabbed ahold of the rake and lifted it up in this position." (T. R. 417.)

Appellant further testified that he grabbed the rake because he became winded grappling with Rowley and wanted him to stop—that he (appellant) was through and wanted the fight to be through; that he wanted only to scare Rowley (T. R. 417) and did not strike him with the rake or with any other implement or weapon. (T. R. 418.)

vened. (T. R. 349.) He received a copy of the statement from the Federal Bureau of Investigation on September 10, 1946. (T. R. 350.) The indictment is dated October 1, 1946, and was returned October 2, 1946. (T. R. 3.)

This statement was read in evidence at the trial (T. R. 247-252) and substantially conforms to Miles' testimony at the trial.

Miles testified that he was called at a witness before the grand jury, but that the United States Attorney came to the door and told him he was not needed. (T. R. 201.)

The United States Attorney told the grand jury, however, that Miles had not been subpoenaed. (T. R. 32.)

Nevertheless, during the presentation of the case to the grand jury, the United States Attorney was told Miles was standing in the hallway outside the grand jury room. (T. R. 34.)

One member of the grand jury inquired as to whether or not Miles would be called as a witness and evidenced a desire to hear him. Although the United States Attorney had seen Miles' written statement and presumably knew the substance of his available testimony, he suggested that the grand jury take a vote. The grand jury, by a majority decision, decided to hear no more witnesses; the United States Attorney then told Miles it would not be necessary for him to appear. (T. R. 34.) Consequently, Miles was not called before the grand jury. (T. R. 32, 33.)

PHOTOGRAPHS TAKEN OF ROWLEY'S HEAD.

Brown, the police officer, went to the hospital on the day of the affray to attend an operation on Rowley's head. When he arrived at the hospital the head had been completely shaven and the operation was already in progress. (T. R. 152.)

During the operation the doctors made an incision reaching from a point half way down Rowley's forehead to the back part of his skull and then laterally toward each ear. (T. R. 300.)

Brown took four photographs of Rowley's head during the course of the operation. These photographs were admitted in evidence over the objection of appellant's counsel as being offered for no other purpose than to excite prejudice and horror in the minds of the jury and to arouse passion and prejudice by photographs of blood and bone. (Plaintiff's Exhibits Nos. 7, 8, 9 and 10, T. R. 152-9.)

The court cautioned the jury that the photographs were being admitted only for the purpose of showing the condition of the wounded man, and warned them that they should not be influenced by the horror of the subject matter. (T. R. 157.)

Exhibit No. 9 (T. R. 156) is a photograph of Rowley's skull, brain tissue, blood and fragments of bone taken during the operation. (T. R. 300.)

Exhibit No. 10 (T. R. 157) is one of the same series of pictures. (T. R. 300.)

All of these photographs were exhibited to and examined by the jury (T. R. 159) over the objection

of defense counsel. Despite the admonition of the court, the United States Attorney withdrew Exhibits Nos. 7, 9 and 10 from evidence without stating any reason whatsoever for this action. (T. R. 426.)

Exhibit No. 8 (T. R. 155), which remained in evidence, was taken after the operation had been completed (T. R. 300) and the scalp sewn up. (T. R. 301.)

STATEMENT OF POINTS RELIED UPON.

Appellant relies upon the following points:

1. That the trial court erred in giving to the jury Instruction No. 4D.

By giving said instruction to the jury, the trial court erroneously deprived appellant of the right to present to the jury his theory of defense and to have the jury consider appropriately in connection therewith the vital matter of self-defense.

In giving said instruction to the jury, the trial court also erroneously invaded the province and function of the jury by substantially directing the jury on facts within the province and function of the jury to deliberate and render a verdict upon.

The trial court wrongfully assumed in its charge that appellant had committed an assault upon Rowley and attempted to hit and injure Rowley with his fists. Both of these material facts were in issue, controverted and disputed and were matters to be determined by the jury.

2. The trial court erred in giving to the jury Instruction No. 4, wherein the court disclosed to the jury the lesser punishment which might be imposed by the court for a violation of the included offense of assault, and failed to indicate to the jury the greater punishment provided for the crime charged in the indictment, to wit, assault with a dangerous weapon.

This instruction could easily have induced the jury to render a verdict of guilty of the crime charged in the indictment in the belief and on the assumption that the court would impose the lesser punishment disclosed in the instruction; as a matter of fact, the court, on conviction, meted out the greater punishment which had not been disclosed to the jury.

3. That the trial court committed reversible error in failing to instruct the jury on the law of self-defense as applicable to the offense charged in the indictment and the included offense of assault.

4. That prejudicial error was committed in allowing photographs of the injured man's head to be introduced in evidence, exhibited to the jury and subsequently withdrawn from evidence. The only purpose of their introduction was to inflame and prejudice the jury against appellant.

5. That appellant was prejudiced in the presentation of his defense by the failure of the United States Attorney to disclose, prior to the trial, the precise theory as to the instrument or implement used by appellant in the alleged assault and by the erroneous rulings of the trial court thereon.

6. That the trial court was without jurisdiction of the offense charged on the ground that the indictment does not state facts sufficient to constitute a crime.

ARGUMENT.

FIRST POINT RAISED: 1. THAT THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 4D.

By giving said instruction to the jury, the trial court erroneously deprived appellant of the right to present to the jury his theory of defense and to have the jury consider appropriately in connection therewith the vital matter of self-defense.

In giving said instruction to the jury, the trial court also erroneously invaded the province and function of the jury by substantially directing the jury on facts within the province and function of the jury to deliberate and render a verdict upon. The trial court wrongfully assumed in its charge that appellant had committed an assault upon Rowley and attempted to hit and injure Rowley with his fists. Both of these material facts were in issue, controverted and disputed and were matters to be determined by the jury.

(a) The court's instruction (4D) that it was no defense to the crime charged in the indictment or to the included crime of assault, that the complaining witness may have voluntarily entered into a fight with appellant, each attempting to hit and injure the other with his fists, is an erroneous statement of law.

In giving Instruction 4D the trial court said, in part:

> "It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States." (T. R. 11.)

By giving this instruction the trial court completely removed the issue of self-defense from the jury's consideration.

As shown in appellant's statement of facts (p. 5, supra), there is positive evidence showing that Rowley struck the first blow in the altercation (T. R. 416) and voluntarily entered into a fight with appellant. (T. R. 91, 127, 416.)

It is well established that self-defense is a valid defense to a charge of assault.

State v. Stanford, 218 Ia. 951, 256 N. W. 650;

Eggers v. Commonwealth, 195 Ky. 827, 243 S. W. 1023;

Fightmaster v. Skoll, 231 Ky. 232, 21 S. W. (2d) 269;

Britton v. State, 95 Tex. Cr. R. 83, 253 S. W. 519.

Likewise the issue of self-defense in a prosecution for assault with a dangerous weapon is an issue which should be presented to the jury under proper instructions.

Meadows v. U. S., 82 Fed. (2d) 881, 883-885;
People v. Leslie, 9 C. A. (2d) 177, 48 Pac. (2d) 995;
State v. Robinson (Mo.), 182 S. W. 113;
State v. Fredericks, 136 Mo. 51, 37 S. W. 832;
Thomas v. State, 68 Okla. Cr. 63, 95 Pac. (2d) 651;
Daniel v. State, 67 Okla. Cr. 174, 93 Pac. (2d) 47;
State v. Linville, 127 Ore. 565, 273 Pac. 338.

In the *Robinson* case, supra, the court said:

"A defendant, in a criminal prosecution for assault, is entitled to an instruction on self-defense, although his own testimony is the only evidence to support it."

When self-defense is an issue the court's instructions must not take that issue from the jury.

Frank v. U. S. (C.C.A. 9th), 42 Fed. (2d) 623;
Armstrong v. U. S. (C.C.A. 9th), 5 Alaska Fed. 510, 41 Fed. (2d) 162;
Huber v. U. S. (C.C.A. 9th), 4 Alaska Fed. 763, 259 Fed. 766;
Burns v. State, 229 Ala. 68, 155 So. 561, 562;
Morris v. State, 146 Ala. 66, 41 So. 274, 282, 283;
Cobb v. State, 24 Ala. App. 358, 135 So. 417, 418;

Terry v. State, 21 Ala. App. 100, 105 So. 386;
King v. State, 19 Ala. App. 153, 96 So. 636;
Dilburn v. State, 16 Ala. App. 371, 77 So. 983;
Elliott v. State, 16 Ala. App. 464, 78 So. 633, 634;
Phillips v. State, 190 Ind. 159, 129 N. E. 466;
State v. Lionetti, 93 N.J.L. 24, 107 Atl. 47.

Nor should the issue of self-defense be taken from the jury's consideration even though the complaining witness used no weapon, but only his fists.

Meadows v. U. S., supra;
Elliott v. State, supra;
Dilburn v. State, supra.

(b) The court's instruction 4D wrongfully assumed that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists, whereas these material facts were in issue, controverted and disputed and were matters to be determined by the jury.

The court's assumption is contained in the following language:

> "Even if you should believe that Rowley called the defendant a liar * * * the use of such words by Rowley * * * *would not justify an assault by the defendant upon Rowley.*" (Italics ours.)
>
> "It is no defense to the crime charged * * * that Rowley may have voluntarily entered into a fight with the defendant, *each* attempting to hit and injure the other with his fists." (Italics ours.) (Instruction 4D, T. R. 11.)

In the first part of the quoted instruction, the court clearly assumed and informed the jury that appellant

committed an assault upon Rowley. In the second part, by the use of the word "each", the court likewise assumed and informed the jury that appellant attempted to hit and injure Rowley with his fists.

These were material facts in issue, controverted and disputed, and were matters that should have been left to and resolved by the verdict of the jury.

Each question suggested by the evidence, whether offered by either side, should be submitted to the jury, regardless of whether the jury would accept the evidence as true and regardless of the trial court's opinion thereof.

McAffee v. U. S., 105 Fed. (2d) 21, 26;
Kinaid v. U. S., 96 Fed. (2d) 522, 526;
Martin v. Govt. of Canal Zone (C.C.A. 5), 81 Fed. (2d) 913;
Hendry v. U. S., 233 Fed. 5, 18;
Henderson v. State, 20 Ala. App. 124, 101 So. 88;
State v. Hatcher, 210 N. C. 55, 185 S. E. 435, 436;
Dilburn v. State, supra;
Elliott v. State, supra.

In charging the jury, the separate elements essential to constitute the crime should be stated clearly to the jury in such manner as not to render it possible for the jury to think that any disputed fact is thereby assumed to be true. As a general rule, it is error for the court, in its charge, to assume, either directly or indirectly, the existence or non-existence of any material fact in issue on which there is either no evi-

dence, or on which the evidence is controverted, or, if disputed, is such that different inferences reasonably might be drawn therefrom.

Starr v. U. S., 153 U. S. 614;
Burtnett v. U. S., 62 Fed. (2d) 452, 456;
Sturcz v. U. S., 57 Fed. (2d) 90, 92;
Ward v. U. S. (C.C.A. 9th), 4 Fed. (2d) 772;
Pincolini v. U. S. (C.C.A. 9th), 295 Fed. 468;
Jackson v. U. S., 48 App. D. C. 272, 277, 278;
Peo. v. Lee Chuck, 74 Cal. 30, 36, 15 Pac. 322;
Peo. v. Williams, 17 Cal. 142;
Peo. v. Delgado, 28 Cal. App. (2d) 665, 83 Pac. (2d) 512;
Peo. v. Haack, 86 Cal. App. 390, 397, 260 Pac. 913;
Peo. v. Parish, 59 Cal. App. 302, 210 Pac. 633;
Peo. v. Woodcock, 52 Cal. App. 412, 199 Pac. 565;
Tarver v. State, 17 Ala. App. 424, 85 So. 855, 857;
Dilburn v. State, supra;
Marsh v. State, 125 Ark. 282, 188 S. W. 815, 816;
Bridges v. State, 169 Ark. 335, 275 S. W. 671, 672;
McAndrews v. People, 71 Colo. 542, 208 Pac. 486-8, 24 A.L.R. 659;
Dwyer v. State, 93 Fla. 777, 112 So. 62;
Bates v. State, 78 Fla. 672, 84 So. 373, 375-6;
Moore v. State, 53 Ga. App. 472, 186 S. E. 469;
Vincent v. State, 153 Ga. 278, 112 S. E. 120, 128;

Peo. v. Kallista, 313 Ill. App. 321, 40 N. E. (2d) 105, 106;
Gray v. Richardson, 313 Ill. App. 626, 40 N. E. (2d) 598, 600;
Peo. v. Biella, 374 Ill. 87, 28 N. E. (2d) 111, 112;
Peo. v. Browning, 302 Ill. App. 297, 23 N. E. (2d) 736, 737;
Peo. v. Celmars, 332 Ill. 113, 163 N. E. 421, 424;
Peo. v. Harvey, 286 Ill. 593, 122 N. E. 138, 142;
Hubbard v. State, 196 Ind. 137, 147 N. E. 323, 325;
State v. Cater, 100 Ia. 501, 69 N. W. 880, 883;
State v. Thornhill, 188 La. 762, 178 So. 343, 353;
Barber v. State, 125 Miss. 138, 87 So. 485;
State v. Mazur (Mo.), 77 S. W. (2d) 839, 840;
State v. Stewart (Mo.), 29 S. W. (2d) 120, 123, 124;
State v. Johnson (Mo.), 234 S. W. 794, 795, 796;
State v. Harrington, 61 Mont. 373, 202 Pac. 577, 578;
State v. Pitman (N. J.), 119 Atl. 438, 439;
State v. Lionetti, supra;
Peo. v. Parretti, 234 N. Y. 98, 136 N. E. 306, 309, 310;
Colby v. State, 57 Okla. Cr. 162, 46 Pac. (2d) 377, 378;
Lunsford v. State, 53 Okla. Cr. 305, 11 Pac. (2d) 539, 540;
Walls v. State, 32 Okla. Cr. 108, 240 Pac. 146, 147;

State v. Andrews, 35 Ore. 388, 58 Pac. 765, 766;
Commonwealth v. Watson, 117 Pa. S. 594, 178 A. 408, 409;
Supina v. State, 115 Tex. Cr. R. 56, 27 S. W. (2d) 198;
Hughes v. State, 99 Tex. Cr. App. 244, 268 S. W. 960-1-2;
Redwine v. State, 85 Tex. Cr. App. 437, 213 S. W. 636, 637;
Webb v. Snow (Utah), 132 Pac. (2d) 114, 118;
State v. Hanna, 81 Utah 583, 21 Pac. (2d) 537, 539, 540;
State v. Seymour, 49 Utah 285, 163 Pac. 789, 792;
State v. Newman, 101 W. Va. 356, 132 S. E. 728, 734;
State v. Laura, 93 W. Va. 250, 116 S. E. 251, 252.[1]

As heretofore pointed out, in giving Instruction 4D the trial court in effect stated to the jury that *appellant committed an assault upon Rowley and attempted to hit and injure Rowley with his fists.*

In so charging the jury, the trial court wrongfully assumed material and controverted facts that should have been left to the jury for determination.

Unquestionably the jury was misled and appellant was prejudiced thereby.

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[1]A perusal of the instruction found faulty in these cases and a comparison thereof with instruction 4D in the case at bar vividly illustrates and emphasizes the glaring and most harmful consequences of such highly prejudicial instructions. See Appendix for illustrations of such prejudicial instructions and the respective courts' comments thereon.

By giving instruction 4D the trial court singled out and gave undue prominence to controverted facts and favored the prosecution's theory. Such an instruction is calculated to mislead the jury and prejudice the defendant's rights.

Meadows v. U. S., supra,

where the court said:

> "* * * It is, of course, familiar law that 'to single out and declare the effect of certain facts without consideration of other modifying facts' will constitute prejudicial error."

citing

Weddel v. U. S. 213 Fed. 208, 210;
Urban v. U. S. 46 Fed. (2d) 291, 293;
Perovich v. U. S. 205 U. S. 86, 92, 27 S. Ct. 456.

To the same effect:

Lindsey v. U. S. 133 Fed (2d) 368, 375;
State v. Brannon (W. Va.), 137 S. E. 649, 650;
State v. Johnson (Mo.), 234 S. W. 794, 795, 796.

Nor should the trial court "in any manner in its charge to the jury disparage or cast suspicion upon any legitimate defense interposed in an action, such as * * * self-defense * * *, nor upon any class of legitimate evidence offered to support a defense."

Asher v. State, 201 Ind. 353, 168 N. E. 456, 458, cited with approval in:

State v. Johnson (S. D), 17 N. W. (2d) 345, 346.

SECOND POINT RAISED: 2. THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 4, WHEREIN THE COURT DISCLOSED TO THE JURY THE LESSER PUNISHMENT WHICH MIGHT BE IMPOSED BY THE COURT FOR A VIOLATION OF THE INCLUDED OFFENSE OF ASSAULT, AND FAILED TO INDICATE TO THE JURY THE GREATER PUNISHMENT PROVIDED FOR THE CRIME CHARGED IN THE INDICTMENT, TO WIT, ASSAULT WITH A DANGEROUS WEAPON.

This instruction could easily have induced the jury to render a verdict of guilty of the crime charged in the indictment in the belief and on the assumption that the court would impose the lesser punishment disclosed in the instruction; as a matter of fact, the court, on conviction, meted out the greater punishment which had not been disclosed to the jury.

In giving Instruction No. 4 (T. R. 8, 9) the trial court instructed the jury on the crime charged in the indictment (assault with a dangerous weapon) and upon the included offense of assault, and concluded this instruction by reading to the jury Section 4779 of the Compiled Laws of Alaska defining the crime of assault, which included the following language:

> "* * * shall be fined not more than $500.00 or imprisoned in the federal jail not more than six months, or both."

Nowhere in its instruction did the trial court inform the jury of the greater penalty provided for the offense charged in the indictment, i.e. assault with a dangerous weapon (six months to ten years in the penitentiary or one month to one year in a federal jail, or $100 to $1000 fine—Sec. 4778 Compiled Laws of Alaska).

After verdict the court sentenced appellant to three years in the federal penitentiary under Section 4778, supra.

Stating the lesser punishment for assault without likewise stating the greater punishment for assault with a dangerous weapon, tended to mislead and influence the jury and constituted prejudicial error.

The disclosure of a lesser penalty, without an accompanying disclosure of the greater, has been held to constitute an invitation to the jury to convict, in the belief that a penalty not greater than that disclosed would be meted out by the court.

Miller v. U. S. 37 App. D. C. 138, 143;
Bethel v. State, 162 Ark. 40, 257 S. W. 740;
Mitchell v. State, 155 Ark. 413, 244 S. W. 443, 444;
Snyder v. State, 155 Ark. 479, 244 S. W. 746;
Pittman v. State, 84 Ark. 292, 105 S. W. 874-5;
Osius v. State, 96 Fla. 318, 117 So. 859, 861;
Bryant v. State, 205 Ind. 372, 186 N. E. 322, 325;
State v. Tennant, 204 Ia. 130, 214 N. W. 708, 710;
State v. Mayer, 204 Ia. 118, 214 N. W. 710, 712;
Abney v. State, 123 Miss. 546, 86 So. 341;
Peo. v. Sherman, 264 App. Div. 274, 35 N. Y. S. (2d) 171, 175;
Peo. v. Santini, 221 App. Div. 139, 222 N. Y. S. 683, 685;
Peo. v. Chartoff, 75 N. Y. S. 1088, 1089;

Bean v. State, 58 Okla. Cr. R. 432, 54 Pac. (2d) 675;

Commonwealth v. Switzer, 134 Pa. 383, 19 Atl. 681;

Ramirez v. State, 112 Tex. Cr. App. 332.

The danger in this type of instruction lies in the fact that the jury is directed away from the consideration of the evidence and toward speculation upon what the probable punishment will be. This point is well illustrated in the case of *Miller v. U. S.,* supra, where the trial court among other things told the jury it was within the court's power to mete out any kind of punishment—heavy to light—and on conviction inflicted the maximum punishment of twenty years on the defendant.

The court said:

"While it is permissible for the trial court to caution the jury not to be influenced by the probable consequences of their verdict, as all responsibility after verdict is with the court, it is error for the court to put before the jury any considerations outside the evidence that may influence them and lead to a verdict not otherwise possible of attainment. The deliberations of the jury should revolve around the evidence before them, and should be uninfluenced by other considerations or suggestions. The moment other suggestions or considerations find lodgment in their minds, that moment they stray from the path which the law has marked out, and their verdict, in consequence, does not rest solely upon the evidence. It is a colored and false verdict. When we consider that the existence of a reasonable doubt entitled a defendant to an acquittal and that a

very slight circumstance may affect the verdict, the danger from putting before the jury anything that may improperly influence their deliberations becomes more apparent. It is an unpleasant duty for the citizen to be compelled to sit in judgment upon his fellow citizen and it is still a more unpleasant duty to be compelled to vote for his conviction. It is apparent, therefore, that if the jury receive the impression that the consequences of a conviction are not likely to be serious, such an impression, in a doubtful case, will be almost certain to affect the verdict, and where that impression is obtained from the court, the consequences are all the more serious, for the obvious reason that the jurors will assume that the court has some object in mind when it indulges in such an intimation."

THIRD POINT RAISED: 3. THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY ON THE LAW OF SELF-DEFENSE AS APPLICABLE TO THE OFFENSE CHARGED IN THE INDICTMENT AND THE INCLUDED OFFENSE OF ASSAULT.

The trial court failed to give any instruction whatsoever on the issue of self-defense. Moreover, by giving Instruction 4D (T. R. 11) it completely removed that issue from the jury's consideration. This was prejudicial error.

It is the duty of the court, whether request therefor be made or not, to instruct on each and every essential question in the case so as to properly advise the jury of the issues.

Sorrells v. U. S., 287 U. S. 435, 452;
Armstrong v. U. S., supra;

Driskill v. U. S., 24 Fed. (2d) 525;
Peo. v. Leslie, supra;
Peo. v. Rallo, 119 Cal. App. 393, 6 Pac. (2d) 516;
Burns v. State, 229 Ala. 68, 155 So. 561, 562;
Davis v. State, 214 Ala. 273, 107 So. 737, 741;
Duncan v. State, 30 Ala. App. 356, 6 So. (2d) 450, 453;
Dozier v. State, 12 Ga. App. 722, 78 S. E. 203;
State v. Hatch, 57 Kan. 420, 424, 46 Pac. 708;
Lowe v. Commonwealth, 298 Ky. 7, 181 S. W. (2d) 409, 412;
Duff v. Commonwealth, 297 Ky. 502, 180 S. W. (2d) 412, 413;
Allen v. Commonwealth, 245 Ky. 660, 54 S. W. (2d) 44, 45;
Smiley v. Commonwealth, 235 Ky. 735, 32 S. W. (2d) 51;
Patrick v. Commonwealth, 234 Ky. 33, 27 S. W. (2d) 387, 389;
Commonwealth v. Saylor, 156 Ky. 249, 160 S. W. 1032;
Tucker v. Commonwealth, 145 Ky. 84, 140 S. W. 73, 74;
State v. Robichaux, 165 La. 497, 115 So. 728;
State v. Turnbo (Mo.), 267 S. W. 847, 849;
Behrens v. State, 140 Neb. 671, 1 N. W. (2d) 289, 293;
State v. Jones, 79 N. C. 630;
State v. Robertson, 191 S. C. 509, 5 S. E. (2d) 285;

Orr v. State, 146 Tex. Cr. App. 576, 177 S. W. (2d) 210;

Matterson v. State, 142 Tex. Cr. App. 250, 152 S. W. (2d) 352, 354-5;

Brickell v. State, 138 Tex. Cr. App. 101, 134 S. W. (2d) 262;

Murphy v. State, 130 Tex. Cr. App. 610, 95 S. W. (2d) 133;

Yeager v. State, 96 Tex. Cr. App. 124, 256 S. W. 914;

Thurogood v. State, 87 Tex. Cr. App. 209, 220 S. W. 337;

Collins v. State, 82 Tex. Cr. App. 24, 198 S. W. 143;

Teel v. State (Tex. Cr. App.), 69 S. W. 531, 533;

Morzee v. State (Tex. Cr. App.), 51 S. W. 250, 251.

In *State v. Stanford,* supra, in discussing the rights of a defendant who gave evidence of self-defense in answer to a charge of assault and battery, the court said:

> "The trial court submitted the crime of assault and battery as an included offense. It was the duty of the court *on its own motion* to fully and correctly state the law in relation to this offense, and, in view of the defense made, to advise the jury of the defendant's right of self-defense as it related to the crime of assault and battery." (Italics ours.)

To the same effect:

State v. Bryant, 213 N. C. 752, 197 S. E. 530, 533;

State v. Williams, 185 N. C. 685, 687;

Skelly v. State, 64 Okla. Cr. 112, 77 Pac. (2d) 1162.

The positive testimony of appellant clearly injected the theory of self-defense into this case.

Appellant testified that Rowley hit him three or four times in a matter of seconds; that appellant's wind wasn't very good; that as Rowley struck him, appellant hit him on the left side and gave him a shove, and that as Rowley started to get up appellant grabbed hold of a rake because he was winded and wanted Rowley to stop. Appellant then testified that he was through; that he wanted the fight to be through and grabbed the rake to scare Rowley——to get him to stop. (T. R. 416-7.) Appellant further testified that he never struck Rowley with any implement. (T. R. 418.)

Foote corroborated appellant to some extent. He testified that when Rowley was falling the first time, appellant was backing away from him toward the door of his house. (T. R. 91, 93.)

Under these facts, appellant was entitled to have the jury instructed on his theory of defense, namely self-defense.

Appellant was entitled to have the jury so instructed even though his tsetimony might have been the only evidence supporting such theory.

In *Richardson v. Commonwealth,* 273 Ky. 321, 116 S. W. (2d) 639, 640, the trial court failed to give an instruction on accidental killing, despite defendant's testimony that the shooting was accidental. The court, in holding that failure to instruct on defendant's theory of the case was prejudicial error, stated:

> "The rule is firmly established that the court must give instructions in criminal cases applicable to every state of the case deducible from the evidence, and the accused is entitled to instructions submitting his theory of the case *as disclosed by his testimony.*" (Italics ours.)

To same effect:

Gibson v. State, 89 Ala. 121, 8 So. 98, 100;

Dozier v. State, supra;

Jackson v. Commonwealth, 265 Ky. 458, 97 S. W. (2d) 21, 23;

Glover v. Commonwealth, 260 Ky. 48, 83 S. W. (2d) 881, 882;

Huff v. Commonwealth, 250 Ky. 486, 63 S. W. (2d) 606;

Garrison v. Commonwealth, 236 Ky. 706, 33 S. W. (2d) 698, 700;

State v. Arnett, 258 Mo. 253, 167 S. W. 526, 528;

State v. Fredericks, supra;

Baker v. State, 109 Tex. Cr. App. 433, 5 S. W. (2d) 149;

Collins v. State, supra.

FOURTH POINT RAISED: 4. THAT PREJUDICIAL ERROR WAS COMMITTED IN ALLOWING PHOTOGRAPHS OF THE INJURED MAN'S HEAD TO BE INTRODUCED IN EVIDENCE, EXHIBITED TO THE JURY AND SUBSEQUENTLY WITHDRAWN FROM EVIDENCE. THE ONLY PURPOSE OF THEIR INTRODUCTION WAS TO INFLAME AND PREJUDICE THE JURY AGAINST APPELLANT.

Appellee's Exhibits 7, 8, 9 and 10 were admitted in evidence over the objection of appellant and were exhibited to the jury. These exhibits were all photographs of the complaining witness's head taken during the progress of and after an operation upon him. The photographs are reproduced in the appendix of the brief. Appellant objected to these exhibits on the ground that they were offered for no other purpose than to excite prejudice and horror in the minds of the jury and to arouse passion and prejudice by depicting blood and bone. (T. R. 152-9.)

Of the four photographs, Exhibits 7, 9 and 10 were taken before the operation was completed and showed the long T shaped open incision made by the surgeons; the opening in the skull and the exposed brain tissue, fragments of bone and blood. Exhibit 8 was taken after the operation had been completed and the wound sewn up. (T. R. 300-301.)

After all of the testimony had been taken in the case and just before the arguments to the jury, the United States Attorney, without any explanation, withdrew Exhibits 7, 9 and 10 from evidence and requested that they not go to the jury. (T. R. 426.)

It is appellant's contention that this conduct on the part of the United States Attorney clearly demon-

strates that his only purpose in offering the photographs showing the large incision, brain tissue, bone fragments and blood in the open skull, was to excite prejudice and horror in the minds of the jury. No other reasonable explanation can be offered in view of the fact that Exhibit 8 (the photograph taken after the wound had been closed) was left in evidence. This position is made conclusive by the fact that only Exhibit 8 was actually used by Dr. Romig (a prosecution witness) to explain the position and nature of the wound. (T. R. 300-301.)

Exhibits 7, 9 and 10 were not used or referred to by any witness for the purpose of illustrating the nature, position or character of Rowley's wound. These exhibits were merely identified, introduced in evidence, shown to the jury and then withdrawn at the close of the testimony.

The case of *State v. Miller,* 43 Ore. 325, 327-329, 74 Pac. 658, contains a clear elucidation of improper use of photographs as evidence. There the court said:

> "There is a limit, however, to the use of photographs as evidence, and, while they are competent for some purposes, they are not competent or appropriate for all. Generally, they may be used to identify persons, places, and things; to exhibit particular locations or objects where it is important that the jury should have a clear idea thereof, and the situation may thus be better indicated than by the testimony of witnesses, or where they will conduce to a better or clearer understanding of such testimony. * * * But unless they are necessary in some matter of substance,

or instructive to establish material facts or conditions, they are not admissible, especially when they are of such a character as to arouse sympathy or indignation, or to divert the minds of the jury to improper or irrelevant considerations." (Citing cases.)

Bearing in mind that Exhibits 7, 9 and 10 were in no way related to the testimony of any witness in the case so as to show the nature or character of the actual wound, the following language of the court in the *Miller* case, supra, is especially appropriate:

"The photographs here introduced were wholly unnecessary as proof of the number of shots fired, or the direction from which they were discharged, as it respects the person of the deceased. Nor did they serve to elucidate or to explain the testimony of the witnesses in the case. The shot wounds were distinctly visible upon the body, where also could be seen the direction from which they took effect, and all conditions attending them were susceptible of being established in the ordinary way by the testimony of the witnesses who had occasion to observe and examine them, so that photographic representations of the appearance of the body were neither necessary nor instructive for indicating the existing conditions. Beyond this, the pictures were not faithful reproductions, as one witness testified that they did not show the oblique character of some of the wounds, and they presented a gruesome spectacle of a disfigured and mangled corpse, very well calculated to arouse indignation with the jury, and were manifestly harmful instrumentalities for use as evidence against the defendants, without

being useful, in a legitimate sense, for the state. There was error, therefore, in permitting them to go to the jury."

To the same effect:

Baxter v. Chi. N. W. R. Co., 104 Wis. 307, 80 N. W. 644;

Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691;

Cirello v. Met. Express Co., 88 N. Y. S. 932, 933.

The fact that the United States attorney withdrew Exhibits 7, 9 and 10 from evidence can in no way serve to cure the damage done to appellant by their introduction and exhibition to the jury. Neither can the admonition of the trial court (T. R. 157) that the jury should not be influenced by the horror contained in the exhibits. As was said in *Brown v. State,* 20 Ala. App. 39, 100 So. 616:

"When prejudicial illegal testimony has been admitted, it is always a serious question as to how far such testimony, though withdrawn in the most explicit and emphatic manner, has injuriously affected the defendant. In the case of Maryland Casualty Co. v. McCallum, 200 Ala. 154, 75 South. 92, the Supreme Court said: 'This court has always regarded the practice with cautious disapproval.' (8) We cannot approve the practice here indulged, however unintentional it may have been; for to do so would result in establishing a precedent which in many cases might be hurtful in the extreme. The question under discussion is a simple one, elementary in its nature, and has

been dealt with so often by the appellate courts of this state, it should be a familiar proposition of law to every attorney at the bar and certainly to all trial judges; and to the solicitors who represent the state in the trial of criminal cases. It is not proper practice to burden a defendant's case by introducing in evidence patently illegal, irrelevant, inadmissible and prejudicial facts, and allow this evidence to remain with the jury throughout the trial and until all the testimony is in, and then to simply tell the jury not to consider it. As stated in Cassemus v. State, 16 Ala. App. 61, 75 South. 267, 'The poison that had been injected would be difficult to eradicate.' "

To like effect:

Cadle v. State, 27 Ala. App. 519, 175 So. 327, 329.

Appellant submits that the practice condemned in the *Brown* case, supra, is precisely the practice that was indulged in in this case.

FIFTH POINT RAISED: 5. THAT APPELLANT WAS PREJUDICED IN THE PRESENTATION OF HIS DEFENSE BY THE FAILURE OF THE UNITED STATES ATTORNEY TO DISCLOSE, PRIOR TO THE TRIAL, THE PRECISE THEORY AS TO THE INSTRUMENT OR IMPLEMENT USED BY APPELLANT IN THE ALLEGED ASSAULT AND BY THE ERRONEOUS RULINGS OF THE TRIAL COURT THEREON.

The trial court erred and abused its discretion in overruling the motion of appellant for a new trial, based on the ground of the misconduct of the United States Attorney in withholding evidence from the

Grand Jury, as to the character of the weapon alleged to have been used in the assault charged in the indictment, and in failing to disclose such evidence until during the progress of the trial. By this misconduct the appellant was prevented from having a fair trial.

SIXTH POINT RAISED: 6. THAT THE TRIAL COURT WAS WITHOUT JURISDICTION OF THE OFFENSE CHARGED ON THE GROUND THAT THE INDICTMENT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CRIME.

The trial court erred in denying the motion of appellant made during the course of the trial and after witnesses had testified on behalf of the government, that all the evidence in the case be stricken out and the jury instructed to disregard it, on the ground that the court had no jurisdiction of the case because the indictment does not state facts sufficient to constitute a crime. (T. R. 323 and 338.)

The trial court also erred in denying appellant's motion in arrest of judgment, which was based on the grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The court is without jurisdiction of the offense attempted to be charged in the indictment. (T. R. 31.)

THE SUFFICIENCY OF THE INDICTMENT.

Appellant contends that the indictment is defective in that it does not inform the accused of the "nature and cause of the accusation", within the meaning of the Sixth Amendment to the Constitution of the United States.

In sustaining the indictment the trial court rendered a quite voluminous oral opinion, comprehensive in scope, considering that it was rendered in the midst of the trial, and to which the court adhered in overruling the motion in arrest of judgment.

The views expressed by the trial court in sustaining the indictment indicate that the conclusions arrived at were influenced by what it considered changes in the law as to the essential allegations of a good indictment, brought about by a relaxation of the strict rules of criminal pleading, as evidenced by State codes, court decisions, and the Federal Rules of Criminal Procedure. (T. R. 324 and 335.)

On account of the trial court's apparent misconception of the true meaning of the words in the Sixth Amendment, "the nature and cause of the accusation", the true function of a bill of particulars, and the force and effect of 18 U. S. C. A. 556, we feel it necessary to ask the Court's indulgence to briefly review the development of the law under the Sixth Amendment before proceeding to an analysis of the indictment itself.

THE SIXTH AMENDMENT.

The Sixth Amendment in part provides that the accused shall enjoy the right:

> "* * * to be informed of the nature and cause of the accusation * * * ."

What is meant by the language "nature and cause of the accusation" is illustrated by a long and unbroken line of decisions of the highest courts, establishing a doctrine to which the latest decisions still adhere, showing that there has been no modification of the law as to the fundamental essentials of a valid indictment.

"The object of the indictment is:

> First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, * * * ."
>
> *U. S. v. Cruikshank,* 92 U. S. 542, 558, 23 L. Ed. 588.

> "* * * the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, * * * An indictment not so framed is defective, * * * ."
>
> *U. S. v. Simmons,* 96 U. S. 360, 362, 24 L. Ed. 819.

> "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the *specific offense,* coming under the

general description, with which he is charged." (Italics ours.)

U. S. v. Hess, 124 U. S. 483, 487, 8 S. Ct. 571.

"The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to *advise him what he has to meet,* and to give him a fair and reasonable opportunity to *prepare his defense,* is an indispensable element of that process." (Italics ours.)

Fontana v. U. S., 262 Fed. 283, 286.

This doctrine is approved in *Lynch v. United States,* 10 Fed. (2d) 947, and in *Jarl v. United States,* 19 Fed. (2d) 891.

To the same effect:

U. S. v. Ferranti, 59 F. Supp. 1003, 1005;

White v. U. S. (C. C. A. 10th), 67 F. (2d) 71, 72, 73;

Blake v. State, 147 Tex. Cr. App. 333, 180 S. W. (2d) 351-353.

In the recent case of *Lowenburg v. United States* (C. C. A. 10th), 156 Fed. (2d) 22, the court "gets back to first principles" in the following clear statement (page 23):

"While the strict rules of pleading in criminal prosecutions have been relaxed, the fundamental functions and requirements of indictments have

not been altered or modified. The purpose of an indictment still is to inform the accused of the offense with which he is charged, and this it must do with sufficient clarity to enable him to adequately prepare his defense and to plead the judgment of conviction, if any, as a bar to further prosecution. The essential elements of an indictment were stated by the Supreme Court in United States v. Hess, 124 U. S. 483, 8 S. Ct. 571, 574, 31 L. Ed. 516, as follows: 'The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone. * * *''

Also, in *Sutton v. United States,* 157 Fed. (2d) 661, 663, is the following:

"The Sixth Amendment of the federal constitution requires that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This means that he shall be so fully and clearly informed of the charge against him as not only *to enable him to prepare his defense* and *not be taken by surprise at the trial,* but also that the information as to the alleged offense shall be so definite and certain that he may be protected by a plea of former jeopardy against another prosecution for the same offense." (Italics ours.)

"If the information in the instant case failed to meet either of these requirements, it contained a constitutional defect or omission that prejudicially affected the substantial rights of appellant."

And on rehearing of the *Sutton* case, the subject is further elucidated as follows (page 669):

"* * * Rule 34 is merely declaratory of existing law; it does not conflict with 18 U. S. C. A. Sec. 556 or 28 U. S. C. A. Sec. 391, but should be interpreted harmoniously with these procedural statutes, and neither this rule nor these statutes *impaired or restricted the right of an accused to be fully and definitely informed of the particular charge against him.* Every defendant in a criminal case has the right to be informed of the essential *factual* elements of the offense sought to be charged. The Sixth Amendment guarantees it. To withhold essential facts that are required to describe the accusation with reasonable certainty is to deny full information of the nature and cause of the accusation." (Italics ours.)

* * * * * * *

"No case has yet been found by me which declares that failure to charge the essential element of an offense is a mere technicality; on the contrary, there is general concurrence in the statement that if 'the indictment fails to state facts sufficient to constitute the crime charged, the judgment of conviction cannot, of course, be sustained. Sonnenberg v. United States, 9 Cir., 264 F. 327, 328; Wong Tai v. United States, 273 U. S. 77, 80, 47 S. Ct. 300, 71 L. Ed. 545; Wishart v. United States, 8 Cir., 29 F. 2d 103, 106; Shilter v. United

States, 9 Cir., 257 F. 724, and this even in the absence of an attack of any kind upon the indictment in the court below. Sonnenberg v. United States, 9 Cir., 264 F. 327, 328.

'Where the indictment has been challenged by demurrer, raising not technicality, but matters of substance, and the demurrer has been erroneously overruled, but that much more is it clear that a conviction upon such indictment must be reversed. Moore v. United States, 160 U. S. 268, 16 S. Ct. 294, 40 L. Ed. 422.

'Technicality and substance are not so confused in my mind as that I can bring myself to believe that failure to charge the substantive elements of a federal offense constitutes "technical error, defect or exception which does not affect the substantial rights" of the defendant.'

"It is expressly held in the above case that an indictment is fatally defective if it omits an essential element of the offense sought to be charged; and that the right of an accused to be informed of the nature and cause of the accusation against him is a substantial right, the enjoyment of which is assured by the Sixth Amendment. Then for good measure the court adds: 'It is not a mere technical or formal right, within the meaning of 18 U. S. C. A. Sec. 556 or 28 U. S. C. A. Sec. 391.'

"It is true that these rulings were upon demurrers to indictments, but this is immaterial since the defect was not technical but substantial. In fact, there can be no more substantial error committed against a defendant than the denial of his constitutional rights under the Sixth Amendment. For such an error it was held in Johnson

> v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357, that the court lost jurisdiction of the case. There the court said, 304 U. S. at page 468, 58 S. Ct. at page 1024, 82 L. Ed. 1461, 146 A.L.R. 357: 'If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed'."

The *Sutton* case, decided in 1946, not only brings up to date the doctrine established by the authorities heretofore cited, but clearly explains to what extent the provisions of 18 U.S.C.A. Sec. 556 and 28 U.S.C.A. Sec. 391 affect the question of the sufficiency of a given indictment. The *Sutton* case clears the confusion resulting from the decisions of some courts, which, regarding these sections as cure-alls, have misapplied them in upholding indictments of doubtful sufficiency.

A recent case, although a District Court decision, citing and following the rule in the *Sutton* case, presents a clear statement on this subject. In that case, *U. S. v. Koon Wah Lee,* 6 F.R.D. 456, 457, 458, the court said:

> "Following largely the doctrines laid down in Sutton v. United States, 5 Cir., 157 F. 2d 661, 663, and authorities cited therein, I am of opinion that the indictment does not sufficiently describe, concisely and definitely a crime against the United States, or with sufficient clarity and certainty inform the defendant of the nature and cause of the charge against him so as to bring it within the purview of Rule 7(c) of the new Federal Rules of Criminal Procedure, 18 U.S.C.A.

following section 687, or within the requirements of the Sixth Amendment of the Constitution, so as to exclude it from the operation of Rule 34.

'The Sixth Amendment of the federal constitution requires that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This means that he shall be so fully and clearly informed of the charge against him as not only to enable him to prepare his defense and not be taken by surprise at the trial, but also that the information as to the alleged offense shall be so definite and certain that he may be protected by a plea of former jeopardy against another prosecution for the same offense.'

'If the information in the instant case failed to meet either of these requirements, it contained a constitutional defect or omission that prejudicially affected the substantial rights of appellant.' Rule 34 requires that the courts shall arrest judgment if the indictment does not charge an offense. Statutes, 18 U.S.C.A. Sec. 556 and 28 U.S.C.A. Sec. 391, requiring trial courts to disregard formal defects in indictments do not impair right of defendant to be fully and definitely informed of the charge against him. 157 F. 2d 669.''

The modern rules of criminal pleading have recognized these statutes to the extent only of relaxing the rigor of old common law rules, and dispensing with technical matters of form.

To that extent and to that extent only do they affect the question of the sufficiency of a given indictment.

"While the strict requirements and the formalities of criminal pleading under the common law rules have been modified by modern practice and statute (Sec. 556, 18 U.S.C.A.) this does not mean that matters of substance may be omitted from the allegations of an indictment.

* * * * * * *

"In a criminal proceeding the indictment must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with. It should leave no question in the mind of the court that it charges the commission of a public offense."

Harris v. U. S., 104 Fed. (2d) 41, 45.

As stated in the *Sutton* case, supra, the provisions of neither 18 U.S.C.A. Sec. 556, nor 28 U.S.C.A. Sec. 391 impaired the right of an accused to be fully and definitely informed of the particular charge against him, and,

"* * * 'if the indictment fails to state facts sufficient to constitute the crime charged, the judgment cannot, of course, be sustained.' * * *"

Sutton v. U. S., supra, p. 669.

Appellant contends that the indictment in this case is defective, in that it does not inform him of the nature and cause of the accusation sufficiently to enable him to make his defense, and in that it does not state facts sufficient to constitute the crime of assault with a dangerous weapon.

In the light of the decisions heretofore cited, if the indictment is basically deficient in the respects alleged, appellant has been deprived of a substantial right within the meaning of 28 U.S.C.A. Sec. 391, and the Sixth Amendment. It is not a mere "technical or formal right, within the meaning of U.S.C.A. Sec. 556."

Sutton v. United States, supra, p. 670.

The sufficiency of the indictment in the instant case, as in every indictment, can be determined only by the allegations of the indictment itself, and this determination is not aided but only confused and retarded by invoking in support of its validity, the provisions of 28 U.S.C.A. Sec. 391 and 18 U.S.C.A. Sec. 556, as was done by the trial court.

Throughout the trial court's opinion, repeated reference is made to *Myers v. United States,* 15 Fed. (2d) 977. The dissenting opinion of Judge Booth, in that case, is mentioned but treated as of little importance (T. R. 3.)

The decision in the *Myers* case was later, in effect, overruled by the same court in *Jarl v. United States,* 19 Fed. (2d) 891, 894, and the dissenting opinion of Judge Booth adopted as the correct statement of the law.

Therefore an extract from Judge Booth's opinion is enlightening (p. 987):

> "In order that the accused may 'be informed of the nature and cause of the accusation', the courts have quite uniformly held that the information or

indictment filed against him must fulfill certain requirements or meet certain tests. These tests, as laid down by this court in Miller v. United States, 133 Fed. 337, 341, 66 C.C.A. 399, 403, and other cases, are:

" 'It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction.'

"The tests thus laid down have been consistently recognized by this court. Goldberg v. United States (C.C.A.) 277 F. 211, 215; Armour Packing Co. v. United States, 153 F. 1, 15, 82 C.C.A. 135, 14 L.R.A. (N.S.) 400; Fontana v. United States (C.C.A.) 262 F. 283, 286; Weisman v. United States (C.C.A.) 1 F. (2d) 696; Carpenter v. United States (C.C.A.), 1 F. (2d) 314; Lynch v. United States (C.C.A) 10 F. (2d) 947.

"The majority opinion seems to hold that the indictment or information will be held sufficient if it merely sets forth clearly all of the elements going to make up the offense. This holding, in my opinion, gives effect to a part only of the tests above set out. It fails to recognize the requirements of distinctness and particularity, which mean that the general description of the elements

> of the offense charged must be accompanied with such a statement of facts and circumstances as will inform the accused of the *specific offense,* coming under the general description, with which he is charged. The constitutional requirement is based upon the presumption of innocence, and therefore requires such fullness and particularity as will enable an innocent man to prepare for trial. The fullness and particularity are also requisite to enable the accused to enjoy the benefit of the provision of the Fifth Amendment in regard to double jeopardy. 31 C. J. 650, 663; Miller v. United States, supra; Naftzger v. United States, 200 Fed. 494, 502 (C.C.A. 8); Fontana v. United States, supra."

In the *Jarl* case the court, referring to the dissenting opinion of Judge Booth in the *Myers* case, said (p. 894):

> "The other propositions discussed in that case, contrary to the conclusion in the Lynch case and contrary to the view we are now attempting to maintain, were vigorously combated in a clear and forceful dissent, which we think announced the correct rule by which the sufficiency of a criminal charge must be tested."

This language explicitly overrules the decision in the *Myers* case, to which the trial judge attached great weight in his oral opinion.

If it should seem that unnecessary space has been devoted to establishing by citation of judicial decisions the meaning of the Sixth Amendment, and that the views we have advanced are too well sustained by

the authorities to require argument, may we state that sporadic instances of departure from the doctrine established by the cases cited, as instanced by the opinion of the trial judge in this case, and the decision in the *Myers* case, have made it necessary for the courts to constantly check this tendency.

A BILL OF PARTICULARS CANNOT CURE A DEFECTIVE INDICTMENT.

The trial court, in its opinion, evidenced a misconception of the true office of a bill of particulars.

The trial court, quoting again from the *Myers* case, supra, said:

> "It is incumbent upon him (the defendant) to bring sharply to the attention of the court the matters of *form* or *incompleteness* of which he complains, * * *" (T. R. 334; italics ours),

and the trial court added:

> "If the defendant in good faith had thought he was not sufficiently advised—that he was not informed of the nature and cause of the accusation against him—he could have, as soon as the indictment was returned, demanded a bill of particulars." (T. R. 334.)

An indictment basically defective, that does not state the crime, and does not inform the defendant of the nature and cause of the accusation, cannot be aided by a bill of particulars any more than it can be aided by proof. It has been so held by this court in numerous cases.

In *Foster v. United States,* 253 Fed. 481, 483 (C.C.A. 9th), the court (Judge Gilbert) states:

> "The bill of particulars could not avail to cure the defect of the indictment. A bill of particulars may be ordered by the court in its discretion in cases where the indictment, while so expressed as to be good on demurrer, still does not furnish the defendant all the information he is entitled to have before being compelled to go to trial. It does not constitute a part of the record, and it is not subject to demurrer. Commonwealth v. Davis, 11 Pick. (Mass.) 432. Not having been made by a grand jury on oath, it cannot cure the omission of material averments from an indictment, and it cannot 'give life to what was dead when it left the grand jury'.
>
> * * * * * * *
>
> " 'It is because the indictment is good as against a general demurrer that the defendant is compelled to resort to a motion for a bill of particulars. If it is bad, he has his remedy by demurrer or motion in arrest.' "

And in *Collins v. United States,* 253 Fed. 609, 610 (C.C.A. 9th), this court, speaking through Judge Wolverton, says (p. 610):

> "It should be premised that a bill of particulars can in no way aid or render sufficient an indictment fundamentally bad. The office of a bill of particulars, where the indictment is good, is to render the defendant more particular information as to matters essential to his defense. It is directed to the discretion of the court, and before compelling the defendant to go to trial."

And in *Jarl v. United States,* supra, the court says (p. 894):

> "It is contended that if the first and second counts were not good the defendants had it within their power to cure the defect by requesting a bill of particulars; but that is no remedy for material and substantive omissions from the charge."

In discussing the *Jarl* case, supra, Judge Kennedy in *White v. U. S.*, supra (p. 78), said:

> "* * * And we endeavored to point out in the Jarl case that a bill of particulars could not supply a necessary element of the charge, nor could the prosecuting officer in that way change or amend a charge of a grand jury."

In the *Myers* case, immediately preceding the language quoted by the trial court, appears the following (p. 985):

> "It will not do, however, for a defendant to remain silent when a case *sufficient against general demurrer is stated against him.*" (Italics ours.)

Thus, even the *Myers* case, on which the trial court relies so implicitly (although overruled in every important particular), does not demand the high degree of cooperation from a defendant which the trial court did impose upon appellant.

It is clear from all the authorities that it is only as to matters of form and not of substance, that a defendant can be penalized by his silence. The burden

is at no time upon a defendant to see to it that the indictment states a cause of action.

Without inquiring as to what it would avail appellant to demand a bill of particulars as to matters which the indictment states were "to the grand jury unknown", it is submitted that if appellant had in good faith thought he was not informed of the nature and cause of the accusation against him, he was under no duty or compulsion to demand a bill of particulars.

IT IS PRESUMED THAT A DEFENDANT IS IGNORANT OF WHAT IS INTENDED TO BE PROVED AGAINST HIM.

For the purpose of determining the sufficiency of the indictment in respect to informing a defendant of the nature and cause of the accusation against him and with respect to its fulfilling the statutory requirements, it is important to keep in mind a rule of law that is approved by all the authorities, without exception, which is:

> "As every man is presumed to be innocent until proved to be guilty, he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information."

This doctrine is stated in *People v. Marion,* 28 Mich. 255, 257, and is approved and quoted in the following cases:

State v. McKenna, 24 Utah 317, 67 Pac. 815;
State v. Topham, 41 Utah 39, 123 Pac. 888;

Hemphill v. State, 52 Okla. Cr. 419, 6 Pac. (2d) 450.

To the same effect:

U. S. v. Ferranti, supra;

Blake v. State, supra;

State v. Hale, 71 Utah 134, 263 Pac. 86, 88.

"When one is indicted for a serious offense, the presumption is that he is innocent thereof and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading."

Fontana v. United States, supra (p. 286).

Citing the *Fontana* case, supra, the Circuit Court of Appeals of the 8th Circuit, in *Lynch v. United States,* supra, stated as follows (p. 949):

"Where one is indicted for a serious offense, the legal presumption is that he is not guilty; that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on that presumption, on the presumption that the defendant does not know the facts that the prosecutor thinks make him guilty, and that he is unable to procure and present the evidence in his defense and is deprived of all reasonable opportunity to defend unless the indictment clearly discloses the earmarks, the circumstances and facts surrounding the case of the alleged offense, so

that the defendant can identify, procure witnesses and make defense to it."

The trial court conceded the above principle in its oral opinion. (T. R. 325.)

The rule is reiterated in *U. S. v. Koon Wah Lee,* supra (p. 459), where the court said:

"A defendant being in law presumed to be innocent before and throughout every stage of the trial, it follows that he is presumed to be wholly ignorant that there exists any evidence to convict him of a crime unless the indictment or information sets out plainly, concisely and definitely the essential facts constituting the offense charged. He should not be required to prepare to overthrow unforeseeable evidence that may tend to establish criminal acts not clearly charged against him or included within acts so charged, nor should he be required to prepare and defend against acts which do not plainly describe a crime."

The lower court's analysis of the indictment consists of the following brief statement (T. R. 332, 333):

"The indictment in this case charges the defendant with having 'within the jurisdiction of this court' and 'being then and there armed with a dangerous weapon to wit, a long handled implement, a more exact description of said long handled implement being to the Grand Jury unknown and therefore not stated, did then and there wilfully, feloniously and unlawfully make an assault upon another, to wit, Frank Rowley, with said long handled implement by then and there striking, beating, and wounding the head of the said

> Frank Rowley with the said long handled implement * * *'
>
> "I suggest that there is not a citizen of ordinary intelligence who would now know *precisely* what a defendant had to meet on a trial of that case, and if there are some additional things which he thinks he ought to know, he can find them out by a bill of particulars." (Italics ours.)

The principle is thus well established by unanimous authority, and conceded to be the law by the learned trial judge (T. R. 325), that a defendant is presumed to be absolutely ignorant of what evidence the Government intends to produce against him. From the indictment in the present case it is apparent that even the Grand Jury was unable to describe the weapon alleged to have been used by appellant except as a "long handled implement".

It is presumed that appellant did not know that evidence would be introduced tending to show that such implement was a rake. He was also presumed not to know that evidence would be introduced for the purpose of showing that, as a result of the alleged assault, Rowley's skull was fractured. The United States Attorney stated that even he did not know until during the progress of the trial, that the "long handled implement" referred to in the indictment was a rake, that he came to that conclusion from an experiment performed by Joseph Earl Cooper, Assistant United States Attorney, in his presence, on November 6, 1946 (which experiment, however, was not repeated in the presence of the jury). (T. R. 35.)

In view of all of these circumstances it is difficult to understand how the trial court could arrive at the conclusion, as it did, that "there is not a citizen of ordinary intelligence who would not know *precisely* what the defendant had to meet on a trial of the case." (Italics ours.) (T. R. 332, 333.)

The trial court then proceeded to state that:

> "* * * if there are some additional things which he thinks he ought to know he can find them out by a bill of particulars." (T. R. 333.)

Such a bill of particulars would have to be furnished by a United States attorney, who, the record discloses, claims he did not have this information, and on the order of a court which had already expressly stated that the defendant was informed by the indictment of *precisely* what he had to meet.

AN INDICTMENT PLEADING ONLY THE WORDS OF THE STATUTE IS NOT SUFFICIENT IN THE CASE AT BAR.

Inasmuch as in the argument in the lower court, the government relied strongly on cases upholding indictments drawn in the words of the statute defining or denouncing the offense, one more principle of criminal pleading remains to be established, and that is, that an indictment in the words of the statute is not sufficient unless the statute defines a complete crime.

This means, in the light of the authorities hereinbefore cited, that if the words of the statute inform

a defendant of the "nature and cause of the accusation", sufficiently to enable him to prepare his defense; to enable the court to pronounce judgment, and to protect a defendant against further prosecution for the same offense, the indictment drawn in the words of the statute is sufficient, otherwise not.

This principle of criminal pleading is sustained by the authorities as follows:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Archb. Crim. Pr. & Pl. 291. The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; *not conclusions of law alone.* A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." (Italics ours.)
>
> *U. S. v. Cruikshank,* supra (p. 558).

The above language is expressly approved in *U. S. v. Hess,* supra, and *U. S. v. Carll,* 105 U. S. 611, 26 L. Ed. 1135.

In *State v. Topham,* supra, the authorities on this subject, including those above cited and many others, are reviewed in an able and voluminous opinion.

In *Lowenburg v. U. S.,* supra, the same doctrine is announced, the court quoting from the opinion in *U. S. v. Hess,* supra.

The following language in *Fletcher v. State,* 2 Okla. Cr. 300, 101 Pac. 599, 604, is to the same effect.

> "It is a general rule of law that, if an indictment uses the words of a statute, or words of equal import, to this extent the indictment or information is good. But suppose that an indictment for murder, *or for an assault,* or for larceny, perjury, libel, embezzlement, or for any offense, would simply use the language of the statute, who is bold enough to assert that this is all that the law requires, and that such an indictment or information would be sufficient to charge any offense?" (Italics ours.)

The above-quoted language is approved in *Cole v. State,* 15 Okla. Cr. 361, 177 Pac. 129, 130.

In nearly all the foregoing decisions the requirement that the accused be given sufficient information to "enable him to prepare his defense" is stated as the prime essential of the indictment.

So from 1875, when Chief Justice Waite rendered the opinion in the *Cruikshank* case down to the *Lowenburg* decision in 1946, a period of 71 years, the rule as to the essentials of an indictment, whether charging a statutory or common law crime has re-

mained unchanged, and as stated in the *Sutton* case, supra (p. 669) (on rehearing), neither 18 U.S.C.A. 556, nor 28 U.S.C.A. 391,

> "impaired or restricted the right of an accused to be fully and definitely informed of the particular charge against him. Every defendant in a criminal case has the right to be informed of the essential *factual elements* of the offense sought to be charged. The Sixth Amendment guarantees it. To withhold essential facts that are required to describe the accusation with reasonable certainty is to deny full information of the nature and cause of the accusation." (Italics ours.)

The statute alleged to be violated in this case does not purport to define the crime of assault with a dangerous weapon, but simply prescribes the punishment for doing a certain act, which is designated in general terms, in fact in thirteen words as follows:

> "whoever, being armed with a dangerous weapon shall assault another with such weapon," (Sec. 4778 Alaska Compiled Laws.)

We believe that the great weight of authority sustains the following propositions:

> First: In charging the offense of assault with a dangerous weapon, where the weapon charged to have been used is a dangerous weapon *per se,* or *ex vi termini,* such as a gun, sword, pistol, dirk, and the like, or where the weapon is among those designated by statute as "dangerous" or "deadly" then no further description is necessary.

> Second: Where the weapon charged to have been used is not dangerous *per se,* then a sufficient description of such weapon, the manner of its use and effect produced thereby should be set forth in the indictment.

Many well-reasoned cases support the two propositions above advanced. We review some of them.

In *Moody v. State,* 11 Okla. Cr. 471, 148 Pac. 1055, the indictment charged the defendants with making an assault upon the person of one W. May, "by then and there striking the said W. May with a dangerous weapon, to-wit, a wooden plank."

Upon a demurrer to the indictment the defendants contended that it was too indefinite in that it did not describe the plank and designate in what manner it was used. Their contention was that if a plank is not *per se* a deadly weapon the county attorney was required to plead facts sufficient to show the character of the plank and the manner in which it was used; and that the facts so pleaded must show that the instrument used was of the character set out in the statute and used in such manner as to be reasonably calculated to produce serious bodily injury. The court upheld these contentions, stating (p. 1056):

> "It is a matter of common knowledge that a plank can be used as a weapon of offense or defense in numerous ways without inflicting serious bodily injury or intending to inflict such injury. A plank can also be used in a manner calculated to produce death or serious bodily injury. We are of opinion that the information should have set

out facts sufficient to indicate that an assault with a sharp and dangerous weapon with intent to do bodily harm with justifiable or excusable cause was committed, in view of the fact that the weapon charged was not necessarily a deadly or a dangerous weapon per se. Such a ruling imposes no burdensome duty upon the county attorneys, and in no way tends to interfere with the proper enforcement of the law, but is a reasonable and fair interpretation of the statute, to which the citizenship is entitled. In our judgment the demurrer should have been sustained."

And in *Ponkilla v. State,* 69 Okla. Cr. 31, 99 Pac. (2d) 910, 912, the court said:

"We have long adhered to the rule that when the weapon charged to have been used is not a deadly weapon per se, a sufficient decription of such instrument, the manner in which it was used, and the effect produced by the use thereof should be set forth * * *"

"An ordinary pocket knife is not a deadly weapon per se, and in the absence of an allegation in the information of the same being a deadly weapon, or setting out the manner by which its use might produce death, no offense of assault with intent to kill by means of a deadly weapon is stated; and the court would have no jurisdiction to try the defendant under Section 1873, supra, or pronounce a judgment thereon under a conviction for this alleged offense or any lesser or included offense under said statute."

And in *Bean v. State,* 77 Okla. Cr. 73, 138 Pac. (2d) 563, the court said (p. 83):

"It (fist) certainly is not a dangerous weapon per se, and we have consistently held that if the weapon used in an alleged assault is not deadly per se in an information charging an alleged offense * * * the information should allege facts showing a sufficient description of such weapon, the manner in which it was used, and the effect produced by the use thereof."

In *State v. Harrison,* 225 N. C. 234, 34 S. E. (2d) 1, the court said (p. 2):

"It may not be amiss to call attention to the fact that the 'deadly weapon' in the bill of indictment is simply designated as 'a certain ice pick' without further description, and that it might be an act of proper precaution to procure another bill containing a description of the implement alleged to have been used, such as its weight, size, and material out of which made."

And in *State v. Porter,* 101 N. C. 713, 7 S. E. 902, 903, the court said:

"The court must be able, from an inspection of the charge, in the terms in which it is made in the indictment, to see that its jurisdiction attaches; that the weapon with which the assault was made was a deadly instrument, *not merely by calling it 'deadly'* unless by so describing it by name or with such attending circumstances as show its character as such; and, when so described, the jurisdiction becomes apparent and will be exercised. The present indictment manifestly falls short of this requirement; for, while called a 'deadly weapon', it is designated simply as a 'stick', with no description of its size, weight,

> or other qualities or properties, from which it can be seen to be a deadly or dangerous implement, calculated in its use to put in peril life, or inflict great physical injury upon the assailed." (Italics ours.)

The above last-quoted language is extremely applicable to the indictment in question, which, while alleging the implement used to be dangerous, designates it simply as "a long handled implement," with no further description whatever.

To the same effect, *Parks v. State,* 95 Tex. Cr. R. 207, 253 S. W. 302. There the indictment charged an assault with a knife. This description of the alleged weapon was held to be insufficient.

In *Commonwealth v. White,* 33 Ky. L. R. 70, 109 S. W. 324, 325, the indictment charged a violation of the statutory offense of "drawing a deadly weapon upon another, or pointing a deadly weapon at another." The court says:

> "The rule is that, 'where the words of the statute are descriptive of the offense, the indictment will be sufficient if it shall follow the language and expressly charge the exact offense of the defendant.' But this rule applies only to offenses which are complete in themselves, when the acts set out in the statute have been done or performed. * * * We think this indictment is defective, in that it fails to describe the instrument claimed to be a deadly weapon. It might have been a pistol. It might have been a dirk, a sword, or a heavy, murderous bludgeon. Under this indictment the defendant would not be apprised of the circum-

stances that he would be required to meet and rebut at the trial. * * * The statement in the indictment that the defendant 'did unlawfully and wilfully point a deadly weapon at W. O. B. Lipps' *is a conclusion of the pleader,* insofar as it refers to the character of the weapon. The weapon may be deadly or not, according to its nature or to the manner of its use. Commonwealth v. Duncan, 91 Ky. 595, 16 S. W. 530. *The weapon should be so described in the indictment that the fact that it is a deadly weapon as used must appear from the language of the charge.* Whether a particular weapon, such as a club or stone, is deadly, would be a question of fact to be determined by the jury, and the fact whether it is such is to be submitted under appropriate instructions; but where the weapon charged is a pistol, a gun, a sword, or bowie knife, upon proof of that fact, under an appropriate charge contained in the indictment, a prima facie case would be made out for the prosecution. But the defendant is not required to introduce any evidence until he is first charged in appropriate language with having drawn or pointed a weapon which from its description or manner of use would be a deadly weapon. Nor is the prosecution allowed to supplement a defective charge in the indictment by sufficient proof." (Italics ours.)

IMPLEMENT DEFINED.

The indictment as heretofore stated alleges that appellant, "armed with a dangerous weapon, to wit: a long handled implement" assaulted Rowley. (T. R. 2.)

As hereinbefore pointed out, merely calling an instrument a "dangerous weapon" does not make it so. Such an allegation is merely a conclusion of the pleader.

State v. Porter, supra.

It therefore becomes necessary to define the words "a long handled implement" in order that the court and appellant can ascertain the nature of the charge in the indictment.

Appellant contends, under the authorities hereinabove cited, that the words: "a long handled implement," without further description, do not connote a dangerous weapon per se.

Accordingly, the jurisdiction of the trial court under the indictment never attached.

According to the lay dictionaries an "implement" is defined as follows:

> "Implement. An article of equipment; esp., a tool, utensil, instrument, etc., essential to the performance or execution of something."
>
> Webster's Collegiate Dictionary, 5th Ed. Copyrighted 1941 by G. & C. Merriam Co.

> "Implement. II n. 1. A thing used in work, especially in manual work; a utensil; tool."
>
> Funk & Wagnalls College Standard Dictionary, copyrighted 1943 by Funk & Wagnalls Co.

The law dictionaries define the term as follows:

> "Such things as are used or employed for a trade, or furniture of a house * * * whatever may sup-

ply wants; particularly applied to tools, utensils, vessels, instruments of labor; as, the implements of trade or of husbandry."

Black's Law Dictionary, Third Ed. (1933) p. 924;

Bouvier's Law Dictionary, Rawle's Third Revision (1914).

The decisions defining the word "implement" usually arose by construing statutes relating to the exemption of articles from execution. Under these decisions the word "implement" has come to include a large variety of items, many, which from their very nature, would be harmless in the hands of anyone. To illustrate:

"Binding twine."

Davis v. Anchor, etc. Co., 96 Ia. 70, 64 N. W. 687, 688.

"Violin and bow."

Goddard v. Chaffee, 84 Mass. 395.

"Brushes and towels of a barber."

Laguna v. Quinones, 23 P. R. R. 358.

"Photographic lens of a photographer."

Davidson v. Hannon, 67 Conn. 312, 34 Atl. 1050.

"Trained snakes of a snake charmer."

Magnon v. U. S., 66 Fed. 151, 152.

Others, because of their size or weight could not possibly be used as a weapon in the hands of a human being. Again illustrating:

"A hotel bus."
White v. Geneny, 47 Kan. 741, 28 Pac. 1011.

"A buggy."
Pluckham v. Bridge Co., 104 App. Div. 404, 93 N. Y. S. 748.

"Electric motor and lathe."
In re Robinson, 206 Fed. 176, 177.

"Miner's coal cars, mining timbers and rails."
State etc. v. Justice of Peace, etc., 102 Mont. 1, 55 Pac. (2d) 691, 694.

"Music teacher's piano."
Amend v. Murphy, 69 Ill. 337, 339.

"Printing press and equipment."
Flaxman v. Capitol City Press, 121 Conn. 423, 185 Atl. 417.

"Auto used as a taxi."
Pellish Bros. v. Cooper, supra.

"Machine for making boots."
Daniels v. Hayward, 87 Mass. 43, 44.

"Buggy and a harness."
Wilhite v. Williams, 41 Kan. 288, 21 Pac. 256, 257.

A "dangerous weapon" is one liable to produce death or great bodily harm, or be dangerous to life.
Parman v. Lemmon, 119 Kan. 323, 244 Pac. 227, 229, 44 A. L. R. 1500.

None of the items mentioned in the cases first cited above could possibly be construed as "dangerous weapons" under this definition.

THE UNITED STATES ATTORNEY WITHHELD EVIDENCE FROM THE GRAND JURY AND THEREBY PREVENTED THE GRAND JURY FROM RETURNING A VALID INDICTMENT.

The indictment described the alleged dangerous weapon as "a long handled implement, a more exact description of said long handled implement being to the Grand Jury unknown and therefore not stated." (T. R. 2 and 332.)

An allegation containing a recital "which are to the Grand Jury unknown" is permissible only when the grand jury does not have knowledge of the facts or could not have obtained such knowledge by the exercise of reasonable diligence.

U. S. v. Rhodes, 212 Fed. 513, 517;
Naftzger v. U. S., 200 Fed. 494, 501, 502;
State v. Stowe, 132 Mo. 199, 33 S. W. 799, 802;
Hunnicut v. State, 131 Tex. Cr. 260, 97 S. W. (2d) 957, 8.

Appellant contends that not only were all of the material facts proved at the trial relative to the nature of the alleged "dangerous weapon" available to the grand jury at the time the indictment was returned, but were actually in the possession of the government attorneys and investigators at that time.

The witness Miles gave a written statement to the agents of the Federal Bureau of Investigation on the date of the alleged offense, July 30, 1946, (T. R. 198-200.) In this statement he positively stated that appellant struck Rowley with a rake. (T. R. 249.)

The United States Attorney first saw this statement sometime shortly before the grand jury convened.

(T. R. 349.) He received a copy of the statement from the Federal Bureau of Investigation on September 10, 1946. (T. R. 350.) The indictment is dated October 1, 1946, and was returned October 2, 1946. (T. R. 3.)

This statement was read in evidence at the trial (T. R. 247-252) and substantially conforms to Miles' testimony at the trial.

Instead of exercising due diligence to ascertain the nature of the alleged weapon used so that it might be identified in the indictment and disclosed to appellant, the following series of events illustrate that no diligence whatsoever was used, either to bring the facts before the grand jury, or by the grand jury itself, to ascertain the facts.

Miles testified that he was called as a witness before the grand jury, but that the United States Attorney came to the door and told him he was not needed. (T. R. 201.)

The United States Attorney told the grand jury, however, that Miles had not been subpoenaed. (T. R. 32.)

Nevertheless, during the presentation of the case to the grand jury, the United States Attorney was told Miles was standing in the hallway outside the grand jury room. (T. R. 34.)

One member of the grand jury inquired as to whether or not Miles would be called as a witness and evidenced a desire to hear him. Although the United States Attorney had seen Miles' written statement and presumably knew the substance of his available

testimony, he suggested that the grand jury take a vote. The grand jury, by a majority decision, decided to hear no more witnesses; the United States Attorney then told Miles it would not be necessary for him to appear. (T. R. 34.) Consequently, Miles was not called before the grand jury. (T. R. 32, 3.)

It is thus apparent that the testimony of Miles was available to the government at all times.

Miles' knowledge of the facts had to do with an essential element of the crime charged, that is, the dangerous character of the weapon used, and, more important, it had to do with giving appellant sufficient information as to the "nature and cause of the accusation," which according to all the authorities cited, is the prime requisite of an indictment under the Sixth Amendment.

This is not a case where a prosecuting officer, presenting a case to a grand jury, from a possibly legitimate strategical motive, omits to disclose all the strength of his case, but contents himself with presenting a prima facie case, saving additional witnesses for surprise purposes.

Rather this presents a case where the prosecuting officer withheld from the grand jury testimony as to a vital matter of description, available at all times, and substituted for this available testimony, the words in the indictment, "to the Grand Jury unknown".

This practice is universally condemned by the decisions.

In *Naftzger v. U. S.*, supra, the court said: (p. 502)

"It is of great importance that the criminal laws be enforced against violators of the law, and technicalities should not be used as a shield for criminals. But it is of equal importance that the liberty of citizens should be a matter of concern, and, before a person is put on trial for a felony, an indictment should be returned against him, and that such indictment be allegations of fact, and not of recitals 'which are to the grand jury unknown.' *Such allegations are permissible from necessity* only when the grand jury does not have and *cannot obtain a knowledge of the facts.*" (Italics ours.)

And in *U. S. v. Rhodes*, supra:

"The law is well settled that a criminal charge must be made so certain that a defendant may be reasonably informed of just what he is charged with, that he may plead a conviction or acquittal of such charge to any subsequent indictment thereon. The indictment in this case, in reference to the property alleged to have been so concealed by the defendants, contains the general allegation that it consisted of goods, wares, and merchandise, the character, kind and particular description of *which is to the grand jury unknown.* These matters are important and are allegations *put in issue by the plea of not guilty.* They are allegations that must be sustained by evidence on the part of the government. Such allegations are permissible from necessity only, when the grand jury does not have and *cannot obtain a knowledge of the facts.*" (Italics ours.)

"It has been held by this court that whenever it is charged in the indictment that the property

was received by the accused from a person whose name was unknown to the grand jury, some proof must be offered that said party's name was unknown to the grand jury and that *by the exercise of reasonable diligence it could not be ascertained.*" (Italics ours.)

While *U. S. v. Rhodes,* supra, was a district court decision, the above proposition, laid down in that case, was reviewed and approved in *White v. U. S.* supra (pp. 77, 78.)

See also:

Manley v. State, 138 Tex. Cr. App. 379, 136 S. W. (2d) 613;

Hunnicut v. State, supra,

and

U. S. v. Aurandt, 15 N. M. 292, 107 Pac. 1064, 1066, 7, where the court said:

"Neither do we overlook in this connection the fact, shown by the record, that the war settlement warrant, which it ultimately appeared by photographic copy on the last day of the trial was the article of value in question, was at the date of the finding of this indictment, *in the hands of officers of the government,* and subject to the inspection of the grand jury upon proper process.

While the allegation that further particulars of a transaction are unknown is permissible in indictments under certain conditions and serves a useful purpose in preventing variances, it must not be overlooked *that its use proceeds purely upon grounds of necessity.*

With the passing of the necessity ceases the rule. It should not be so used as to withhold unneces-

sarily from defendants information which in *their proper defense they should have.*" (Italics ours.)

In *People v. Hunt, et al.,* 251 Ill. 446, 96 N. E. 220, 222, the court said:

"Where matters which ought to be stated in the indictment are omitted, and the excuse is stated that such facts were unknown to the grand jurors, the truthfulness of the excuse given is put in issue by the plea of not guilty, and the burden is upon the state to prove such allegation. * * *"

In *State v. Stowe,* supra, (p. 802) the court said:

"* * * In such circumstances as these, there was no excuse for the allegation in the indictment that the description of the horses mentioned in the mortgage was unknown, nor that the names of the mortgagor and mortgagee were unknown to the grand jury. And it is only upon the ground of necessity that such an allegation is admissible. When the necessity fails, the reason supporting such an allegation fails with it; and an indictment will be rendered invalid, and a defendant entitled to a discharge from that indictment, if it appear on the trial either that a person or thing alleged to be unknown was known, or could have been known by the exercise of ordinary diligence. Blodget v. State, 3 Ind. 403; Cheek v. State, 38 Ala. 227. Bishop says: 'If the grand jurors refuse to learn the name when they might, their ignorance of it, thus willfully produced, proceeding from no necessity, creates none; and if they lay it as unknown, proof of the facts at the trial will show the allegation to be unauthorized, and

there can be no valid conviction thereon. As said by the English judges: "The want of description is only excused when the name cannot be known." ' * * * The allegation in an indictment that a person or thing is unknown or cannot be described is a material one and it is traversed by a plea of not guilty, and must be sustained and may be rebutted by proof, and the inquiry before the petit jury will be whether the name was known to the grand jury, or could have been ascertained by due inquiry on the part of the prosecution. * * * Wharton says: 'The test is, had the grand jury notice, actual or constructive, of the name; for if so, the name must be averred.' Cr. Pl. & Prac. (9th Ed.) Sec. 113. If the averment of the name be not made, if known, or when it could readily have been ascertained, this fact, appearing at the trial, will compel a discharge of the defendant from that indictment; but this will not operate as a bar to a trial on a new indictment properly framed. Id. Sec. 112. In the present instance there is no room for doubt that if the grand jury, or their scrivener, the prosecuting attorney, had exercised a modicum of diligence, they could readily have ascertained a description of the horses which Waugh, the prosecuting witness, received from defendant in exchange, and the records of Greene county were constructive notice to them of the mortgage which forms one of the bases of this prosecution, and a few moments' inspection of those records would have revealed the names of the mortgagor and mortgagee alleged in the indictment to be unknown. The indictment being, for the reasons given, wholly insufficient, and being invalid, also, be-

cause of the unfounded allegations of unknown, etc., it has not been deemed necessary to go into the merits of the case. The judgment will be reversed, and the cause remanded, in order that the lower court may conform its action to this opinion. All concur."

All the testimony of the government, including that of Miles, was available to it from July 30th, 1946, the date of the alleged offense to the time of trial. It was not, however, available to appellant and was not stated in the indictment so as to enable appellant to prepare his defense against that evidence. Not until late in the trial of the case, was appellant apprised of the true nature of the hidden evidence against him. Had it been presented to the Grand Jury and been set forth in the indictment he would have had an opportunity to prepare to meet it.

CONCLUSION.

In summarizing, appellant submits:

I.

That the trial court's instructions were erroneous in the following respects:

(a) That in giving Instruction 4D the court assumed facts which should have been submitted to the jury for decision and removed the issue of self-defense from the jury's consideration;

(b) That in giving Instruction 4, the court prejudiced the rights of appellant by commenting on punishment; and

(c) The court failed to give a proper instruction on self-defense which was a material issue in the case, and thus failed to present appellant's theory of defense to the jury.

II.

Prejudicial error was committed in allowing photographs of the injured man's head to be introduced in evidence, exhibited to the jury and subsequently withdrawn from evidence.

III.

The indictment was fatally defective in the following respects:

(a) It did not sufficiently inform appellant of the nature and cause of the accusation within the meaning of the Sixth Amendment;

(b) The alleged "dangerous weapon" was not sufficiently described in the indictment; and

(c) The exact nature of the alleged "dangerous weapon" was known to the United States Attorney, and it could have been easily ascertained by the Grand Jury at the time the indictment was returned. By alleging that the description of the alleged dangerous weapon was "to the Grand Jury unknown", the indictment was rendered defective and appellant was

deprived of the opportunity to prepare his defense to this allegation.

For the foregoing reasons, we believe that the judgment of conviction should be reversed.

Dated, San Francisco, California,
February 16, 1948.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

In the following cases (cited pp. 17, 18, 19, supra), the instructions were held faulty and prejudicial because the trial court, in its charge to the jury, wrongfully assumed controverted facts. The cogent portion of each instruction and opinion are set out.

Peo. v. Parish, supra.

Offense involved: Defendant was convicted of practicing a system and mode of treating the sick and afflicted without a valid, unrevoked certificate from the state board of medical examiners.

Instruction (pp. 303-304):

> "You are instructed to disregard any statement or suggestions of counsel that chiropractors, or the practitioners of any other system of healing the sick, cannot procure a license to practice their system of healing in this state. And you are further instructed that it is no defense in this case for the defendant to argue or attempt to argue to you that the board of medical examiners of this state has discriminated against him. And in this connection you are instructed that the law of the state, besides other forms of license, provides for the issuance of a certificate which entitles the holder thereof to practice the chiropractic system of healing the sick. All that is required of the applicant for such a license is that he present to said board proof that he is possessed of the education required by law.
>
> If the practitioner of any system or mode of the healing art, including chiropractic, has been by

the board of medical examiners of this state denied any right, he has his proper and adequate remedy therefor in another forum, and the jury in this case may not pass upon the same."

Opinion (pp. 304-305):

"There is nothing in the record to show that defendant had ever attempted to secure a license to practice chiropractic or any other system of healing or that his counsel had ever attempted to suggest that such a license could not be procured, or that the board of medical examiners had ever discriminated against him. * * * The only issue presented by the defendant's evidence was the defense that he had not been guilty of practicing any system or mode of healing requiring him to have secured a certificate. A fair interpretation of this instruction requires the construction that it assumed that the defendant had tried to convince the jury that he had attempted to secure a license to heal the sick. It is apparent that the jury may have considered it their duty to assume this to have been the fact and that they may well have regarded that circumstance as material and determinative of the issue as to whether or not the defendant actually did practice a system of treating the sick and afflicted. The instruction also assumes that the defendant had claimed discrimination against him by the board of medical examiners. Being aware that there was not evidence to support such a charge, the jury might easily be prejudiced against him because of having made so false and base a calumny. This would, of course, prevent that fair consideration of the evidence upon the material issues to which every defendant is entitled. It is unnecessary to

point out in greater detail the prejudicial character of this erroneous instruction."

Dilburn v. State, supra.

Offense involved: homicide.

Instruction:

"He (the defendant) would not be justified in using a deadly weapon if struck by the fist, or any other assault which would not likely cause serious bodily harm."

Opinion:

"This was in effect charging the jury that under the evidence the defendant was not justified in using a deadly weapon and *that the blow struck by the fists was not likely to cause serious bodily harm,* which was the very question then being submitted to the jury." (Italics ours.)

McAndrews v. People, supra.

Offense involved: murder.

Instruction:

"The court charges you that, if you believe from the evidence beyond a reasonable doubt that the defendant assaulted and unlawfully struck the said W. G. Keim upon a vital part of his body with great force and violence, and that such striking was, on account of the extreme age and debility of said W. G. Keim, and on account of its force, violence, and aim, an act which in its consequences would naturally and probably destroy the life of said W. G. Keim, and did in fact occasion his death, then you may infer that the defendant was actuated by malice in committing such act, without further proofs, for malice may

be implied when a person without any considerable provocation does an act naturally tending to destroy life. * * *"

Opinion:

"The objection is that the instruction assumes matters not in evidence. The testimony showed that the deceased had always been well, never had serious sickness. His son said he was 58 years old. He weighed 200 to 210 pounds. The reference, then, to his extreme age and debilitated condition is wholly without evidence to support it. Indeed, it is directly contrary to the facts as shown in evidence.

That jurors give great weight to every remark by a trial judge is common knowledge, and it has frequently been commented upon in reported decisions. When, then, this instruction was given, it was almost certain to produce in the minds of the jurors an impression that the court regarded the evidence as showing extreme age and debility on the part of the deceased. A juror would naturally conclude that he had overlooked some testimony and would accept the court's statement, as in accord with the facts * * *."

Bates v. State, supra.

Offense involved: Breaking and entering with intent to commit a felony.

Instruction:

"Certain parts of the confession have been allowed to go into the evidence. I charge you that in weighing the evidence you must take a confession with care and weigh it very carefully in your consideration of the testimony."

Opinion:

"Every admission or confession said to have been made by the defendant was denied by him, and it was a material fact for the jury to determine whether or not there had been a confession or an admission of facts or circumstances pointing to his guilt. In the instruction complained of the court assumed that this material fact had been proven. The rule laid down by this court is that 'A charge that a material fact to have been proven, when there is conflict in the proof as to such fact, is erroneous.' "

Moore v. State, supra.

Offense involved: Riot.

Instruction:

"Now, gentlemen, you take this case. You are not empaneled here to try whether the Ku Klux Klan is a good order or whether it ain't. You are here to try this man for an offense of riot committed by himself and one other or others."

Opinion:

"* * * it is error for the court to assume, or seem to assume, that the defendant participated in the riot."

Vincent v. State, supra.

Offense involved: murder.

Instruction:

"If you find that the deceased had threatened the life of the defendant, and had a pistol for the purpose of killing him, that would not justify the defendant in going to the deceased's place of busi-

ness with the intent to kill him, and, in pursuance of such intent, taking his life."

Opinon:

"The language, 'That would not justify the defendant in going to the deceased's place of business with the intent to kill him, and in pursuance of such intent, taking his life,' does amount to an expression or intimation of opinion by the court that the defendant went to the deceased's place of business with the intent to kill him, and in pursuance of such intent did take his life. As this instruction did assume as true these facts, it would for that reason be objectionable, and requires the grant of a new trial. * * *"

Peo. v. Kallista, supra.

Offense: simple assault.

Instruction:

"* * * and if the pointing of a gun towards the person of George Jockisch was deliberately done, and was likely to be attended with dangerous circumstances, * * *."

Opinion:

"The instruction assumes the pointing of a gun towards the person of George Jockisch. * * *"

Gray v. Richardson, supra.

Offense: Action for damages for personal injuries.

Instruction:

"The care and caution required of the plaintiff was such conduct and care and caution for her own personal safety in alighting from the car in

question as a reasonably prudent and cautious person would have exercised under the same conditions and circumstances, before and at the time of the alleged injury. * * *''

Opinion:

"As we have pointed out plaintiff alleged and offered evidence to show that she was injured while alighting. The defendants' answer averred and the evidence in their behalf was offered to prove that the injury occurred after she had alighted. Thus the point is controverted in the pleadings and the evidence thereon is in conflict. The instruction, therefore, in assuming that she was alighting from the car was highly prejudicial and our courts have held under similar circumstances that the giving of such an instruction constituted reversible error."

Peo. v. Celmars, supra.

Offense: Rape.

Instruction:

"The court instructs the jury if you believe from the evidence in this case that the defendant made an unlawful assault upon the complaining witness in manner and form as set forth in the indictment you have the right to take into consideration all of the facts and circumstances appearing in the evidence, and you also have the right to take into consideration the superior strength of the defendant at the time of the assault, if any is proven, and the suddenness of the attack, the manner in which the attack was made, if the attack was made in the daytime or the night time, the surroundings and place where the alleged at-

tack was made, and any and all other surrounding facts and circumstances appearing from the evidence."

Opinion:

"By this instruction the superior strength of the plaintiff in error and the suddenness of the attack were assumed as facts. These assumptions necessarily involved the precedent assumption that plaintiff in error had committed the assault. It is not the province of the court, in an instruction to the jury, to assume the truth of any controverted fact."

Peo. v. Harvey, supra.

Offense involved: manslaughter.

Instruction:

"The court instructs the jury, as a matter of law, that if one who is in an enfeebled physical condition is unlawfully assaulted and an injury is inflicted upon her which is mortal to her in her enfeebled condition, then, even though such injury would not have been mortal to a woman in good health, still the assailant is deemed in law to be guilty of murder or manslaughter, as the case may be."

Opinion:

"It is argued that this states a mere abstract principle of law not specifically applied to the facts in this case; that it invades the province of the jury, because it assumes controverted facts: First, an assault; second, that the injury was inflicted thereby; and, third, that the injury was mortal. Beyond question the instruction is faulty in assuming these controverted facts."

Barber v. State, supra.

Offense involved: Unlawful possession of intoxicating liquors.

Instruction:

"* * * that, if you believe from the evidence in this cause, that the defendant knowingly had in her possession or under her control intoxicating liquors as testified to by the witness Bonner, then she is guilty as charged, and it is your sworn duty to so find."

Opinion:

"This instruction assumes and in effect charged the jury that Bonner had testified that the whiskey found by him in the appellant's house was there with her knowledge and was in her possession or under her control, when he had not in fact so testified. His testimony, as hereinbefore stated, was simply that the whiskey was found in the appellant's house. Whether she knew the whiskey was there and whether it was in her possession and under her control were facts to be found by the jury from all the evidence in the case. The instruction should not have been given."

State v. Mazur, supra.

Offense involved: common assault.

Instruction:

"* * * if you believe from the evidence that at the time the defendants maimed or disfigured the prosecuting witness by assaulting prosecuting witness they had good reason to believe that the prosecuting witness was about to do them some great bodily harm, then in that case the defend-

ants would be justified under the law of self-defense, and you should acquit them; * * *"

Opinion:

"But few comments are needed to point out fatal error. Felonious assault and not mayhem is the issue, and 'maimed or disfigured' is assumed."

State v. Johnson, supra.

Offense involved: Having carnal knowledge of a female * * * of age of 17.

Instruction:

"The court instructs the jury that if you find * * * the defendant did feloniously assault and carnally know the witness, May White, at the time the assault was charged to have been made, was over the age of 15 years and under the age of 18 years, and that said May White was, at that time, an unmarried female of previously chaste character, and that the defendant was, at the time, over the age of 17 years, you will find the defendant guilty."

Opinion:

"The instruction is unfortunately expressed. If the words 'and if they further find' had been inserted after the words 'May White' where the name of the prosecutrix first appears, so as to read, 'and if they further find that at the time the assault was charged to have been made,' etc., it could not be said that the instruction assumed that May White, 'at the time the assault was charged to have been made, was over the age of 15 years and under the age of 18 years, and that the said May White was, at the time, an unmar-

ried female of previously chaste character.' But as it is written it makes these assumptions. Instructions should never assume controverted facts (citing case). They should be so explicitly adapted to the case that the jury cannot fail to understand the law as applicable to the evidence. When the court undertakes to instruct on a question of law for the guidance of the jury the instruction should guide them fairly." (Citing case.)

State v. Harrington, supra.

Offense involved: Selling intoxicating liquors.

Instruction:

"* * * that the state has elected to stand upon the evidence of the sale by the defendant of one pint of whisky about 8 o'clock of the evening of that day, when the witnesses Ryan and Van Wert were present."

Opinion: In holding that the instruction assumes the fact that Ryan and Van Wert were present and witnessed the sale, the court said:

"This was a comment upon the evidence, and an invasion of the province of the jury in its endeavor to ascertain the facts. That a court may not do this without depriving the accused of his absolute right to have the question of his guilt or innocence, not only of the particular crime charged, but every material incident included in it, passed upon by the jury, is settled by the decision of this court in State v. Koch, 33 Mont. 501, 85 Pac. 272, 8 Ann. Cas. 804, and kindred cases."

Colby v. State, supra.

Offense involved: Receiving stolen property.

Instruction:

"You are further instructed that if you find and believe from the evidence in this case beyond a reasonable doubt that at the time said clock was purchased by the said defendant that he knew that said clock had been stolen, * * *"

Opinion:

"The underlying vice in the foregoing instruction is in the assumption that the defendant purchased and received from the self-confessed thief the property in question. It clearly invades the province of the jury in that it assumes the testimony of the witness Baker to be true. * * *

The trial court is never warranted in giving an instruction which has the effect of determining controverted questions of fact. (Citing case.)

The law requires the court, not only to abstain from positive expression as to the weight of the evidence, but to avoid even the appearance of an intimation as to the facts, and to so guard the language of its charge to the jury, which is the law of the case, that no inference, however remote or obscure, may be drawn by the jury as to the weight of the evidence."

Walls v. State, supra.

Offense involved: Selling intoxicating liquor.

Instruction:

"You are instructed that it is no less an offense to sell intoxicating liquor for any purpose to a sheriff or prosecuting attorney, or to an agent, detective, or representative of either than it is to sell to any one else; and a sale made to such officer or agent or detective, though solicited by him

for the purpose of detecting the commission of the offense and of instituting prosecution therefor, is punishable the same as if the sale had been made to any other person and for other purposes."

Opinion:

"These instructions assume the sale of whisky. This was a controverted question, and the assumption by the court that the sale was made is prejudicial."

Hughes v. State, supra.

Offense involved: Unlawful transportation of intoxicating liquor.

Instruction:

"* * * Now, if you believe * * * that the whiskey found by the officer in the defendant's car was brought to the place * * *".

Opinion:

Instruction assumes defendant had whiskey in his car and that the liquid found was whiskey.

Redwine v. State, supra.

Offense involved: Murder.

Instruction:

"You are further charged that if you believe from the evidence that the defendant, Jewel Redwine, provoked the difficulty for the purpose of killing the deceased * * *

You are further charged that if you believe from the evidence that the defendant, Jewel Redwine, provoked the difficulty only for the purpose of whipping Eulon Ellis, * * *"

Opinion:

"The criticism is that this charge assumed the fact that appellant did provoke the difficulty, and that if he did it for the purpose of killing deceased, and under certain circumstances it would be murder, and under other circumstances it would have been manslaughter. The court is not authorized to assume any fact that is detrimental to the rights of the accused. If the issue of provoking the difficulty is in the case, the court must instruct the jury to first find that fact, * * *."

Webb v. Snow, supra.

Offense involved: Action to recover damages for alleged assault and battery.

Instruction:

"The court instructs you that if you believe from the evidence that the plaintiff was pregnant at the time she was *rendered unconscious* by the blow delivered by one of the defendants' employes, and as a result of said blow and being knocked to the floor she suffered a miscarriage and thereby the loss of her unborn child, you may award her money damages for the *loss of said unborn child.*" (Italics ours.)

Opinion:

"The foregoing instruction disregarded entirely the fact that there was considerable dispute and conflict in the evidence. The instruction, standing alone, would amount to an instruction to find in favor of the plaintiff if the jury found that plaintiff was pregnant at the time she was struck, and if they also found that a miscarriage resulted. The instruction assumes that defendants' employees were to blame for what occurred, and that

the evidence was uncontradicted as to the following: (1) That plaintiff was 'rendered unconscious' by the 'blow,' and (2) that she was knocked to the floor. The instruction is so worded that it indicated to the jury a belief on the part of the court that defendants' employees were blameworthy, irrespective of the acts of plaintiff. As stated in State v. Seymour, 49 Utah 285, 163 P. 789, 792: 'Courts, in charging jurors, should be very careful not to assume any material fact or facts. Jurors, who are laymen, are always eager to follow the opinion or judgment of the court, and if the court assumes any material fact in the charge, the jurors are most likely to follow the assumptions of the court. Indeed, we must assume that such is the case unless the record clearly shows the contrary.' ''

State v. Hanna, supra.

Offense involved: Carnal knowledge of a female under age of consent.

This requested instruction was correctly refused:

"And you are instructed in this connection, that if the evidence offered and received in this case raises in your minds a reasonable doubt as to the presence of the defendant at the place *where the offense was committed, at the time of the commission thereof,* then your verdict should be for the defendant, not guilty." (Italics ours.)

Opinion:

"That it is error for the court in instructing the jury to assume as proven any material controverted fact is held by this court in State v. Seymour, 49 Utah 285, 163 P. 789, 792 * * * So thoroughly established is this principle that it seems

almost superfluous to cite authorities. When the instruction without qualification assumed that the offense had been committed, it thereby relieved the jury of the necessity of weighing the evidence and determining for itself that question. It was the province of the jury to determine whether the offense had been committed, and not for the court to assume it as a proven fact."

Peo. v. Haack, supra.

The instructions declared in effect that recent possession of stolen property, unless satisfactorily explained, is a circumstance tending to show the guilt of the defendant.

Held: This instruction was erroneous and prejudicial as assuming recent possession of stolen property on the part of the defendant.

Peo. v. Woodcock, supra.

The court here noted that the instruction was unduly favorable to the prosecution's theory and carried the intimation on the part of the trial court that the facts supporting the prosecution's theory did in fact exist, and that the inferences which the law permits the jury to draw from the testimony were drawn by the court itself and embodied in the instruction in such a way that the jury must necessarily have assumed that the theory was a fact proved.

Peo. v. Williams, supra.

In this case an instruction contained the word "victim" and the court held it prejudicial because it seemed to assume that the deceased was wrongfully killed and was calculated to prejudice the accused.

No. 11545

In the United States Circuit Court of Appeals for the Ninth Circuit

Z. E. EAGLESTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

RAYMOND E. PLUMMER,
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Attorney for Appellee.

SUBJECT INDEX

	Page
Jurisdictional Statement	1
Statement of Facts	1
Evidence as to Who Struck the First Blow—Progress of Fight	1
Essential Evidence as to the Character of the Alleged Weapon was not Withheld From the Grand Jury	3
Photographs Taken of Rowley's Head	5
Argument	6
First Point Raised: 1. The Trial Court Did Not Err in Giving to the Jury Instruction No. 4D	6
(a) That portion of Instruction 4D which reads: "It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States" (R. 11) is a correct statement of the law	6
(b) Instruction 4D does not wrongfully assume that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists inasmuch as these facts were established by uncontradicted evidence and were admitted by appellant	8
Second Point Raised: 2. The Trial Court Did Not Err in Giving Instruction No. 4 to the Jury	12
Third Point Raised: 3. The Trial Court Did Not Commit Error in Failing to Instruct the Jury on the Law of Self-Defense	16
Fourth Point Raised: 4. The Court Did Not Err in Allowing Photographs of the Injured Man's Head to be Introduced in Evidence	19
Fifth Point Raised: 5. The Court Did Not Abuse Its Discretion in Overruling Appellant's Motion for New Trial	31
Sixth Point Raised: 6. The Indictment Stated Facts Sufficient to Constitute a Crime and the Trial Court had Jurisdiction Over the Offense Charged	32
(a) The Sufficiency of the Indictment	32
(b) The Sixth Amendment	36
(c) It is Presumed That the Defendant is Innocent of What is Intended to be Proved Against Him	40
(d) An Indictment Pleading Only the Words of the Statute is Sufficient in the Case at Bar	42
(e) The United States Attorney Did Not Withhold Evidence From the Grand Jury to the Prejudice of the Defendant, and the Indictment Returned Was Valid and Sufficient in Every Respect	54
Conclusion	59

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TABLE OF AUTHORITIES

Cases: Page

Adams v. *State*, 75 So. 641 — 7, 17
Andrews v. *U. S.*, 224 Fed. 418 — 14
Allred v. *U. S.*, 146 F. 2d 193 — 30
Alvarado v. *U. S.*, 9 F. 2d 385 — 14, 54
Alyea v. *State*, 86 N. W. 1066 — 52
Bailey v. *State*, 24 Ala. App. 354; 135 So. 407 — 20
Banks v. *U. S.*, 147 F. 2d 628 — 32
Beauchamp v. *U. S.*, 154 F. 2d 413 — 36
Berenbein v. *U. S.*, 164 F. 2d 679 — 15
Bob v. *U. S.*, 106 F. 2d 37 — 11
Bone v. *State*, 43 Okla. Cr. 360; 279 P. 363 — 20
Boyd v. *U. S.*, 271 U. S. 104 — 15
Cabiale v. *U. S.*, 276 Fed. 769 — 14
Canterbury v. *State*, 43 So. Rep. 678 — 46
Carson v. *State*, 230 S. W. 997; 89 Tex. Cr. 342 — 7, 17
Castillo v. *State*, 124 S. W. 2d 146 — 53
Ching v. *U. S.*, 264 Fed. 639 — 14
Coagara v. *Territory of Hawaii*, 152 F. 2d 933 — 35
Coffin v. *U. S.*, 156 U. S. 432 — 54
Coleman v. *U. S.*, 3 F. 2d 243 — 14
Commonwealth v. *Collberg*, 119 Mass. 350; 20 Am. Rep. 328 — 6
Commonwealth v. *Remley*, 77 S. W. 2d 784; 257 Ky. 209 — 8
Crampton v. *U. S.*, 16 F. 2d 231 — 10
Dunbar v. *U. S.*, 156 U. S. 185 — 40
Dunn v. *State*, 124 So. 744; 23 Ala. App. 321 — 7, 17
Evans v. *U. S.*, 153 U. S. 584 — 32
Feigin v. *U. S.*, 3 F. 2d 866 — 14
Fippin v. *U. S.*, 162 F. 2d 128 — 35
Frederick, et al. v. *U. S.*, 163 F. 2d 536 — 14, 35, 37
Freihage v. *U. S.* 56 F. 2d 127 — 31
Frisbie v. *U. S.*, 150 U. S. 160 — 54
Garza v. *State*, 102 Tex. Cr. 241; 277 S. W., 382 — 20
Garza v. *U. S.*, 159 F. 2d 413 — 49, 50
Girson v. *U. S.*, 88 F. 2d 358 — 19
Goldstein v. *U. S.*, 73 F. 2d 804 — 31
Goon v. *U. S.*, 15 F. 2d 841 — 19
Grebe v. *State*, 112 Nebr. 759; 201 N. W. 142 — 9
Hagen v. *U. S.*, 268 Fed. 344 — 11
Hagner v. *U. S.*, 285 U. S. 427 — 36
Hargreaves v. *U. S.*, 75 F. 2d 68 — 14
Hopper v. *U. S.*, 142 F. 2d 181 — 37
Humes v. *U. S.*, 170 U. S. 210 — 18
Jackson v. *State*, 19 Ala. App. 399; 97 So. 260 — 20
Jackson v. *U. S.*, 102 Fed. 473 — 42
Janovich v. *State*, 32 Ariz. 175; 256 P. 359 — 23
Jarabo v. *U. S.* 158 F. 2d 509 — 19, 23
Jewett v. *U. S.*, 100 Fed. 832 — 54
Joyce v. *U. S.*, 294 Fed. 665 — 14
Kearnes v. *U. S.* 27 F. 2d 854 — 14

Cases—Continued

	Page
Kempe v. *U. S.* ,160 F. 2d 406	19, 35
Kramer v. *U. S.*, 166 F. 2d 515	35, 37
Lewey v. *State*, 182 So. 98; 28 Ala. App. 245	7, 17
Lonergan v. *U. S.*, 98 F. 2d 591	30
Lovenberg v. *U. S.* 156 F. 2d 22	37
Lowrey v. *U. S.*, 161 F. 2d 30	37
Madden v. *U. S.*, 20 F. 2d 289	22
Maron v. *U. S.*, 18 F. 2d 218	30
May v. *U. S.*, 157 Fed. 1	10
Melvin v. *U. S.*, 252 Fed. 449	32
Mullendore v. *State*, 191 S. W. 2d 149	9
Newton v. *U. S.*, 162 F. 2d 795	35
Norcott v. *U. S.*, 65 F. 2d 913	10
Ochoa v. *U. S.*, 167 F. 2d 341	34, 37, 40
Parsley v. *State*, 148 Ark. 518; 230 S. W. 587	9
Paschal v. *State*, 30 Ga. App. 22; 116 S. E. 899	20
People v. *Dunn*, 177 P. 2d 553	23
People v. *Ferlin*, 203 Cal. 587; 265 P. 230	23
People v. *French*, 12 Cal. 2d 720; 87 P. 2d 1014	9
People v. *Goodwin*, 9 Cal. 2d 711; 72 P. 2d 551	23
People v. *Harris*, 219 Cal. 727; 28 P. 2d 906	23
People v. *Lathrop*, 49 Cal. App. 63; 192 P. 722	20
People v. *Macias*, 174 P. 2d 895	48
People v. *Manning*, 320 Ill. App. 143; 50 N. E. 2d 118	20, 22
People v. *Moore*, 57 N. E. 2d 511	51
People v. *Oppenheimer*, 156 Cal. 733; 106 P. 74	48
People v. *Petters*, 84 P. 2d 54	48
People v. *Russo*, 133 Cal. App. 468; 24 P. 2d 580	23
People v. *Shaver*, 7 Cal. 2d 586; 61 P. 2d 1170	22
People v. *Thal*, 61 Cal. App. 48; 214 P. 296	11
People v. *Weir*, 102 P. 539	46
Peterson v. *U. S.*, 4 F. 2d 702	10
Phelps v. *U. S.*, 160 F. 2d 626	15, 37
Phelps v. *U. S.*, 160 F. 2d 858	60
Raffour v. *U. S.*, 284 Fed. 720	14
Rasmussen v. *U. S.*, 8 F. 2d 948	31
Robison v. *City of Decatur*, 32 Ala. App. 654; 29 So. 2d 429	10
Rohrback v. *Pullman's Palace Car Co.*, 166 Fed. 797	9
Rourbay v. *U. S.*, 115 F. 2d 49	31
Russell v. *State*, 165 So. 256	7, 17
Shepard v. *U. S.*, 236 Fed. 73	10
Simpson v. *U. S.*, 289 Fed. 188	30
Sistrunk v. *U. S.*, 162 F. 2d 188	15
Skiskowski v. *U. S.*, 158 F. 2d 177	19
Smith v. *U. S.*, 41 F. 2d 215	14
Sparks v. *U. S.*, 90 F. 2d 61	51
Speak v. *U. S.*, 161 F. 2d 562	38
Spevak v. *U. S.*, 158 F. 2d 594	19
Springer v. *U. S.*, 148 F. 2d 411	19
State v. *Allen*, 246 S. W. 946	20

Cases—Continued

	Page
State v. *Brown*, 165 S. W. 2d 420	9
State v. *Compton*, 31 S. D. 430; 205 N. W. 31	22
State v. *Cooler*, 112 S. C. 95; 98 S. E. 845	9
State v. *Cunningham*, 144 P. 2d 303	27
State v. *Darrah*, 92 P. 2d 143	11
State v. *Dennis*, 177 Ore. 72; 159 P. 2d 839	23
State v. *Eggleston*, 161 Wash. 486; 297 P. 162	23
State v. *Henggeler*, 312 Mo. 15; 278 S. W. 743	20
State v. *Johnson*, 23 Wash. 2d 751; 162 P. 2d 440	20
State v. *Jones*, 173 P. 2d 960	9
State v. *Knight*, 289 P. 1053	53
State v. *McDonie*, 89 W. Va. 185; 109 S. E. 710	20
State v. *Maggert*, 209 P. 989	52
State v. *Miller*, 231 Iowa 863; 2 N. W. 2d 290	9
State v. *Nelson*, 162 Ore. 430; 92 P. 2d 182	22, 23, 24
State v. *Newman*, 128 N. J. Law 82; 24 A. 2d 206	9
State v. *Payne*, 25 Wash. 2d 407; 171 P. 2d 227	23
State v. *Quong*, 8 Idaho 91; 67 P. 491	20
State v. *Roe*, 7 Voyce 95; 103 A. 16	9
State v. *Sims*, 31 So. Rep. 906	45
State v. *Smith*, 196 Wash. 534; 83 P. 2d 749	23
State v. *Vane*, 178 P. 456; 105 Wash. 421	11
State v. *Walsh*, 72 Mont. 110; 232 P. 194	22
State v. *Whitzell*, 175 Wash. 146; 26 P. 2d 1049	22
State v. *Williams*, 50 Nev. 271; 257 P. 619	22
State v. *Young*, 53 Or. 227; 96 P. 1067	20
St. Clair v. *U. S.*, 154 U. S. 134	54
Sutton v. *U. S.*, 79 F. 2d 863	31
Sutton v. *U. S.*, 157 F. 2d 661	38, 39
Toi v. *U. S.*, 273 U. S. 77	15
Tokashashi v. *U. S.*, 143 F. 2d 118	11
Tatum v. *U. S.*, 110 F. 2d 555	50
Tisdale v. *State*, 199 Ind. 1; 154 N. E. 801	9
Tung v. *U. S.*, 7 F. 2d 111	14
U. S. v. *Bickford*, 168 F. 2d 26	32, 37
U. S. v. *Bushwick Mills*, 165 F. 2d 198	15, 16
U. S. v. *Hand*, 26 F. Cas. No. 15,297, 2 Wash. C. C. 435	8
U. S. v. *Josephson*, 165 F. 2d 82	35
U. S. v. *Lynch*, 11 F. 2d 198	42
U. S. v. *Monroe*, 164 F. 2d 471	15
U. S. v. *Sutter*, 160 F. 2d 754	19
U. S. v. *Wilson*, 154 F. 2d 803	10
Utley v. *U. S.*, 115 F. 2d 117	32
Vedin v. *U. S.*, 257 Fed. 550	14
Viliborghi v. *State*, 43 P. 2d 210; 45 Ariz. 275	22
Waggoner v. *U. S.*, 113 F. 2d 867	14
Watts v. *U. S.*, 161 F. 2d 511	15, 19
Wellman v. *U. S.*, 297 Fed. 925	10
Yates v. *State*, 113 So. 87; 22 Ala. App. 105	8
Young v. *State*, 38 Ariz. 298; 299 P. 682	23

Texts:	Page
4 Am. Juris., Sec. 84, p. 173	6
6 C. J. S., Sec. 91, p. 943	9
6 C. J. S., Sec. 92, p. 948	7
6 C. J. S., Sec. 116, p. 980	17, 22
6 C. J. S., Sec. 123, p. 989	20
6 C. J. S., Sec. 122, pp. 989, 990	20
23 C. J. S., Sec. 852, pp. 51, 52	22
23 C. J. S., Sec. 852, pp. 53, 54	23
23 C. J. S., Sec. 1166, pp. 702–705	10
23 C. J. S., Sec. 1169, pp. 711, 712	11
24 C. J. S., Sec. 1922, pp. 1022–1023	10
Webster's New International Dictionary, 2d Ed	8
Miscellaneous:	
Rule 30, Federal Rules of Criminal Procedure	16, 18
Rule 52 (a), Federal Rules of Criminal Procedure	12, 60

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11545

Z. E. EAGLESTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in appellant's opening brief (p. 1).

STATEMENT OF FACTS

Evidence as to who struck the first blow—Progress of fight

Rowley and Miles knocked on the door of appellant's room (R. 181, 427). Appellant came to the door and said, "What the hell is your hurry, can't you wait a few minutes?" (R. 248, 415). A conversation followed and they came out of the house discussing the price of an oil tank (R. 97, 191, 249).

The evidence is not clear as to whether Rowley, either in substance or in so many words, called Eagleston a liar. Eagleston so testified (R. 416). Foote, who had been financed by some unknown person in the house-moving business which required considerable heavy machinery subsequent to the commission of this crime (R. 117–118), testified contrary

to his signed statement and to his testimony at the preliminary hearing and before the grand jury, and supported Eagleston's testimony (R. 105). Rowley did not so testify (R. 175), and Miles did not hear Rowley say anything after Eagleston stated to him, "You can't call me a liar" (R. 192).

Rowley was quiet, soft-spoken and mild in his manner. He did not act at all belligerent toward Eagleston and did not appear to act in any way that would provoke Eagleston into attacking him or fighting with him (R. 251, 107–108).

It is undisputed that Eagleston challenged Rowley to fight by directing or ordering him to take off his glasses (R., Foote, 90, 96; Rowley, 175; Miles, 192, 249; Eagleston, 416). Likewise there is little, if any, dispute as to who struck the first blow. Foote testified that they both had their hands up and Eagleston hit Rowley with his right hand (R. 91, 96). Rowley testified that he took off his glasses and Eagleston hit him (R. 195). Miles stated that Eagleston then hit Rowley two or three times (R. 192, 249). Strutz related that he saw four men standing in the yard and the first blows he saw struck were when Slim hit Rowley about three times—twice on the right side and once on the left (R. 255, 278). Eagleston's testimony is in conflict with the testimony of other witnesses only to the extent that his testimony indicated that simultaneous or concurrent blows were struck (R. 417).

After Rowley was hit he staggered back up against a lumber pile in the yard (R. 192). He went to the ground and as he started to pick himself up Eagleston hit him with a rake. After he was hit with the rake

by Eagleston he slumped to the wall (R. 192). His head dropped down and he stretched right out (R. 195). There was blood on his hair and his foot was twitching (R. 195). Foote took the rake from Eagleston (R. 193) and Louis Strutz arrived (R. 193). Strutz made a remark to Eagleston that he had hit him (Rowley) hard. Eagleston said in a challenging voice, "Did you see me strike him?" (R. 256). While Foote was able to describe the events immediately prior to and subsequent to the actual striking, he did not see the blow struck. Apparently at that precise moment Foote had turned around (R. 93, 97, 99). Both Rowley and Eagleston were out of Foote's line of vision for a short period of time (R. 132). When Foote again saw Rowley he was falling the second time (R. 92, 131).

Essential evidence as to the character of the alleged weapon was not withheld from the grand jury

The indictment reflects that Howard G. Romig, M. D., Frank Rowley, Muriel Karlovich, David Z. Foote, and Louis Strutz testified before the grand jury (R. 2). The indictment charges that the offense was committed on July 30, 1946. A small piece of metal was found in the wound on Rowley's head (R. 306–307) which was returned to the FBI after the preliminary hearing (R. 307). Shortly thereafter the shovel and rake were forwarded to the Federal Bureau of Investigation laboratory in Washington, D. C. (R. 363, 365, 366). The indictment was prepared prior to October 2, 1946 (R. 34). At that time the United States Attorney had not seen either the

shovel or rake, as they had been transmitted to Washington. At the time the indictment was prepared, the United States Attorney believed the dangerous weapon used by appellant to be either a shovel or rake (R. 34). He was unable to determine which was used until approximately 12:30 on November 5, 1946 (R. 139), when certain experiments were performed in his presence (R. 35).

Some of the members of the grand jury indicated that they desired to have Howard Romig recalled and to have George Miles and Elmer Brown called as additional witnesses (R. 32). The United States Attorney left the grand jury room to have subpoenas issued and to have these witnesses brought to the Federal Building by the United States Marshal (R. 33). When he returned to the grand jury room he was advised by the foreman that a majority of members had voted against hearing additional witnesses and that they were ready to consider the next matter (R. 33, 34). Subsequent to the return of the indictment and shortly before the trial, the shovel and rake were returned from Washington, D. C., to Anchorage (R. 365).

At the trial of the case the witness Robertson testified in regard to a bloody shovel found at the scene of the crime. He made no mention of a rake (R. 55, 57, 65). He also testified that Rowley had told him in the police car that Eagleston had picked up a shovel and swung it at him and that he had felt a sharp blow on his head (R. 71). Eckert also testified concerning the finding of the bloody shovel at the crime scene but made no mention of a rake (R. 78,

79, 82, 83). Foote (R. 97, 110, 112, 122) and Brown (R. 150, 165, 167) likewise testified in regard to the finding of this bloody shovel. Chief of Police White, who was partially in charge of the investigation of this case (R. 400), had never heard anything about Eagleston striking Rowley with a rake (R. 407) although the signed statements he had witnessed specifically mentioned rake. Chief White had told Police Commissioner Ed Dodd, a former gambler (R. 400) who showed particular interest in this case (R. 400, 401), that the weapon used had been a shovel. In the complaint of a $55,000 civil action by Rowley against Eagleston it was alleged that Rowley had been struck on the head with an instrument which he had been informed was a heavy iron No. 2 shovel (R. 187). Louis Strutz at first had a slight image that the instrument used was a rake, but when he was called to the police station and shown the bloody shovel, he changed his opinion to a shovel or rake (R. 257, 269).

Dr. Davis testified that the wound on Rowley's head could have been inflicted with a shovel or with any blunt instrument (R. 377). Dr. Sogn likewise testified that the injury could have been inflicted by either a shovel or rake (R. 389).

Photographs taken of Rowley's head

Photographs of Rowley's head, taken on the afternoon of July 30, 1946, showing the nature, location, and extent of his injury, were admitted in evidence as Plaintiff's Exhibits Nos. 7, 8, 9, and 10 (R. 152, 159). They were admitted for the purpose of showing in part the condition caused by the wound suffered by

Rowley (R. 154, 157). The jury was properly cautioned and instructed regarding the purpose of the pictures and the manner in which they were to be considered by the jury (R. 157). Appellant's attorney conceded at the trial of the case that the exhibits were material to show the direct results of any blow that might have been struck (R. 154). The pictures were shown to the jury on November 5, 1946, the first day of the trial, but were not again called to the attention of the jury during the remainder of the trial.

ARGUMENT

First point raised: 1. The trial court did not err in giving to the jury instruction No. 4D

(a) That portion of Instruction 4D which reads: "It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States" (R. 11) is a correct statement of the law

It is no defense to a criminal prosecution for assault and battery that the defendant was engaged in a mutual combat. In cases of mutual combat by agreement, each participant may be prosecuted criminally.

> 4 Am. Juris., Sec. 84, p. 173.
>
> *Commonwealth* v. *Collberg,* 119 Mass. 350; 20 Am. Rep. 328.

In *Commonwealth* v. *Collberg,* the Court in its opinion stated:

> It was said by Coleridge, J., in *Regina* v. *Lewis,* 1 C. & K. 419, that "no one is justified in striking another except it be in self defense, and it ought to be known that whenever two persons

go out to strike each other and do so, each is guilty of an assault"; and that it was immaterial who strikes the first blow.

Where the accused invites the prosecuting witness to engage in a fight, self-defense cannot be set up in a prosecution for aggravated assault, the rules of mutual combat being applicable. A similar rule applies where defendant fights willingly although he did not provoke the difficulty.

6 C. J. S., Sec. 92, page 948.
Russell v. *State,* 165 So. 256 (C. C. A. Ala.).
Adams v. *State,* 75 So. 641.
Lewey v. *State,* 182 So. 98; 28 Ala. App. 245.
Dunn v. *State,* 124 So. 744, 23 Ala. App. 321.
Carson v. *State,* 230 S. W. 997, 89 Tex. Cr. 342.

A plenary examination of the entire record reveals that there were no facts raising the issue of self-defense in the trial court and Instruction 4D did not remove the issue of self-defense from the jury's consideration. The fact is undisputed that appellant deliberately provoked the fight and invited or challenged the witness Rowley to engage in mutual combat. His invitation or challenge to fight, when he told Rowley "to take off his glasses," is uncontradicted and was admitted by appellant (R., Robertson, 70; Foote, 90; Rowley, 175; Miles, 192 and 245; Eagleston, 416).

The assertion made by appellant that there is positive evidence that Rowley struck the first blow (Appellant's Brief p. 13) is not supported by the record. The positive testimony of the witnesses Robertson, Foote, Rowley, Miles, and Strutz established beyond

any doubt that appellant struck the first blow (R. Robertson, 70; Foote, 91 and 96; Rowley, 175; Miles, 192 and 249; Strutz, 255 and 278).

Appellant's own testimony shows that appellant and Rowley were sparring around, each of them trying to strike the other, and that the blows which were struck were struck concurrently or simultaneously—"And as he hit me, I hit him on the left side" (R. 417). It is apparent that appellant voluntarily and willingly engaged in mutual combat.

(b) Instruction 4D does not wrongfully assume that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists inasmuch as these facts were established by uncontradicted evidence and were admitted by appellant

Eagleston, as a witness in his own behalf, testified, "* * * we were sparring around (demonstrating)—we were hitting at one another * * *. And as he hit me, I hit him on the left side * * *" (R. 417).

The word "spar" is defined in Webster's New International Dictionary, 2nd Edition, as follows: "To box with the fists; esp. to box scientifically."

An assault is an offer or attempt to do by force a corporal injury to another, as if one strike at another with his hands or stick, and miss him.

> *U. S.* v. *Hand* (Pa.), 26 F. Cas. No. 15297, 2 Wash. C. C. 435.
>
> *Commonwealth* v. *Remley,* 77 S. W. 2d 784; 257 Ky. 209.
>
> *Yates* v. *State,* 113 So. 87; 22 Ala. App. 105.

The record reveals that appellant admitted challenging Rowley to fight and that he then willingly and voluntarily engaged in combat with Rowley during the

course of which *each* of them, according to appellant's statement, attempted to strike, and did strike the other. There is no assumption on the part of the court in this portion of Instruction 4D. The court merely instructed on facts in the case admitted by defendant and the instruction is a correct statement of the law.

It is a well recognized rule that in the absence of statute, mere words, no matter how abusive, insulting, vexatious or threatening they may be, will not justify an assault or battery.

6 C. J. S., Sec. 91, p. 943.

Rohrback v. *Pullman's Palace Car Co.*, C. C. A. Pa. (1909) 166 Fed. 797.

Parsley v. *State,* 148 Ark. 518; 230 S. W. 587.

State v. *Roe,* 7 Voyce 95, 103 At. 16.

Tisdale v. *State,* 199 Ind. 1; 154 N. E. 801.

State v. *Miller,* 231 Iowa 863; 2 N. W. 2d 290.

State v. *Brown,* 165 S. W. 2d 420.

Mullendore v. *State,* 191 S. W. 2d 149.

Grebe v. *State,* 112 Nebr. 759; 201 N. W. 142.

State v. *Cooler,* 112 S. C. 95; 98 S. E. 845.

People v. *French,* 12 Cal. 2d 720; 87 P. 2d 1014.

State v. *Newman,* 128 N. J. Law 82; 24 A. 2d 206.

State v. *Jones,* 173 P. 2d 960.

As a general rule, an instruction is not erroneous as invading the province of the jury because it assumes the substance of facts which are admitted by the parties, especially by accused, which are agreed on by counsel, which are established clearly by uncontradicted evidence, or which are established clearly and

conclusively by the evidence beyond a reasonable doubt.

23 C. J. S., Sec. 1166, pp. 702–705.
Crampton v. *U. S.,* 16 F. 2d 231.
Wellman v. *U. S.,* 297 F. 925.
May v. *U. S.,* C. C. A. 9, 157 F. 1.
Shepard v. *U. S.,* C. C. A. 9, 236 F. 73.
Peterson v. *U. S.,* C. C. A. 9, 4 F. 2d 702.

The improper assumption of facts in an instruction will not operate to reverse where no prejudice results, as where the facts assumed are admitted, undisputed or conclusively proved; or are immaterial; or where the evidence leaves no reasonable doubt of accused's guilt; or where the finding of the facts is left to the jury.

24 C. J. S., Sec. 1922, pp. 1022–1023.
May v. *U. S.,* C. C. A. 9 (1907), 157 F. 1.
Shepard v. *U. S.,* C. C. A. 9 (1916), 236 Fed. 73.
Peterson v. *U. S.,* C. C. A. 9 (1925), 4 F. 2d 702.
U. S. v. *Wilson,* C. C. A. 2 (1946), 154 F. 2d 803.
Norcott v. *U. S.,* C. C. A. 7 (1933), 65 F. 2d 913.
Robison v. *City of Decatur,* 32 Ala. App. 654; 29 So. 2d 429.

Although certain language standing alone might appear to be on the weight of the evidence, or to convey an intimation of the court's opinion on issuable facts, the instruction will not be regarded as erroneous on this ground if an examination of the entire charge shows that no improper comment or expression of opin-

ion was in fact expressed and, likewise, although part of a charge may be open to the objection that it assumes a fact in issue, this error will be cured when the charge taken as a whole overcomes the objection. An improper comment or assumption of facts may in many instances be cured by subsequent instructions to the effect that the jury are the exclusive judges of the facts, to conclude solely on the facts, to disregard any opinion of the judge, and the like. * * *

Takahashi v. *U. S.,* C. C. A. 9, 143 F. 2d 118, 122.

Bob v. *U. S.,* C. C. A. 2, 106 F. 2d 37, 40.

Hagen v. *U. S.,* C. C. A. 9, 268 Fed. 344, 346.

23 C. J. S., Sec. 1169, pp. 711, 712.

People v. *Thal,* 61 Cal. App. 48, 214 P. 296.

State v. Darrah, 92 P. 2d 143.

State v. *Vane,* 178 P. 456; 105 Wash. 421.

A consideration of the Court's entire charge to the jury readily reveals that there is no possibility that appellant was prejudiced in any manner by Instruction 4D. This Court's attention is invited to the following portions of the trial court's instructions:

> You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.
>
> As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

802610—48——2

> During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone. (Instruction No. 11–R. 19.)
>
> You are the ones who finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom. (Instruction No. 10A–R. 19.)

Rule 52 (a), Federal Rules of Criminal Procedure, provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Although appellant boldly asserts that "unquestionably the jury was misled and appellant was prejudiced thereby," a consideration of the entire record in this case reveals that Instruction 4D was a correct statement of the law based on admitted facts, and that no prejudice resulted to the appellant by the giving thereof.

Second point raised: 2. The trial court did not err in giving Instruction No. 4 to the jury

The complete answer to appellant's second specification of error is found in Rule 30, Federal Rules of Criminal Procedure, which reads, in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter

to which he objects and the grounds of his objection.

The memorandum of exceptions to instructions (R. 22–23) reflects that no objection was made or exception taken to Instruction No. 4 as given. That this was no oversight is indicated by the fact that appellant's counsel did except to the refusal of the Court to give his requested instructions (R. 21–22), and also excepted to other instructions, namely, 4E and 4D (R. 23). The concluding remark of appellant's counsel, Mr. Grigsby, "That's all" (R. 23), is tantamount to a declaration that the remainder of the charge as given, including Instruction No. 4, was completely satisfactory to appellant's counsel.

Since no objection was made, or exception taken, to Instruction No. 4 as given by the trial court, and since no prejudice to appellant resulted by the giving of this instruction, this specification of error should not now be considered.

The record in the present case fails to reflect that the giving of Instruction No. 4 prejudiced the appellant in any manner whatsoever. There is no plain prejudicial error affecting a substantial or fundamental right of the appellant that would warrant this court to invoke Rule 52 (b), Federal Rules of Criminal Procedure. Nor is there any indication that the jury concerned themselves with anything other than the guilt or innocence of the defendant in this case.

Upon the facts reflected by the record in this case, the proper rule, and the rule consistently followed by this Court, is that an error assigned to a charge

will not be considered on review in the absence of an exception.

Frederick, et al. v. *U. S.,* C. C. A. 9, 163 F. 2d 536, 549.

Waggoner v. *U. S.,* C. C. A. 9, 113 F. 2d 867, 868.

Hargreaves v. *U. S.,* C. C. A. 9, 75 F. 2d 68, 73.

Smith v. *U. S.,* C. C. A. 9, 41 F. 2d 215, 216.

Kearnes v. *U. S.,* C. C. A. 9, 27 F. 2d 854, 855.

Alvarado v. *U. S.,* C. C. A. 9, 9 F. 2d 385, 386.

Lee Tung v. *U. S.,* C. C. A. 9, 7 F. 2d 111.

Coleman v. *U. S.,* C. C. A. 9, 3 F. 2d 243.

Feigin v. *U. S.,* C. C. A. 9, 3 F. 2d 866, 867.

Joyce v. *U. S.,* C. C. A. 9, 294 F. 665.

Raffour v. *U. S.,* C. C. A. 9, 284 F. 720.

Cabiale v. *U. S.,* C. C. A. 9, 276 F. 769.

Henry Ching v. *U. S.,* C. C. A. 9, 264 F. 639.

Vedin v. *U. S.,* C. C. A. 9, 257 F. 550, 552.

Andrews v. *U. S.,* C. C. A. 9, 224 F. 418, 419.

In the *Frederick* case, *supra,* this Court, in an opinion by Judge Garrecht, stated:

> It has long been the settled rule in Federal Courts that an instruction by the court must be excepted to in order to be availed of on appeal. This is no merely technical requirement, but is founded upon reason, justice and expediency. If the error is seasonably called to the court's attention, the court can correct it forthwith and thus obviate the necessity of a new trial. *Tucker* v. *U. S.,* 151 U. S. 164, 170. *St. Clair* v. *U. S.,* 154 U. S. 134, 153. *Lindsay*

v. *Burges,* 156 U. S. 208, 210. *Howland* v. *Beck,* 9th Cir., 56 F. 2d. 35, 37. *Brevard* v. *Tannin Co.,* 4th Cir., 288 Fed. 725, 730. *Meadows* v. *U. S.,* 4th Cir., 144 F. 2d. 751, 753.

See also:

Berenbein v. *U. S.,* C. C. A. 10, 164 F. 2d 679, 685.

U. S. v. *Monroe,* C. C. A. 2, 164 F. 2d 471, 473.

Sistrunk v. *U. S.,* C. C. A. 5, 162 F. 2d 188.

Watts v. *U. S.,* C. C. A. 5, 161 F. 2d 511, 514.

Phelps v. *U. S.,* C. C. A. 8, 160 F. 2d 858, 875.

U. S. v. *Bushwick Mills,* C. C. A. 2, 165 F. 2d 198.

Boyd v. *U. S.,* 271 U. S. 104.

Wong Tai v. *U. S.,* 273 U. S. 77.

In the case of *U. S.* v. *Bushwick Mills, supra,* the Court, in its opinion, stated:

> The Defendants were content to let the jury pass upon their guilt under the charge as given. Only after they had taken this gamble and lost, did they question the charge. Under these circumstances they should be held to have waived the errors they now assert with respect to instructions as to venue.

Both the attorneys who represented the appellant throughout his trial were from Anchorage, Alaska. It is reasonable to assume that appellant and/or his attorneys were personally acquainted with some of the members of the jury, or at least that they acquired some information concerning them during the *voir dire* examination. It is within the realm of possi-

bility that appellant and his attorneys, after studying the demeanor and appearance of the members of the jury, and perhaps having personal knowledge of the background of some of the jurors, felt that that portion of Instruction 4 which they now assign as error might have inured to their benefit. It is reasonable to assume that counsel for appellant, feeling that John Doe, a member of the jury, would be opposed to conviction, would feel that the penalty prescribed for simple assault would be sufficient punishment, and that he would, therefore, not vote for conviction of the crime of assault with a dangerous weapon. The words of Judge Swan in *U. S.* v. *Bushwick Mills, supra,* seem fitting to the situation presented here.

Third point raised: 3. The trial court did not commit error in failing to instruct the jury on the law of self defense

Here likewise, it would seem that Rule 30, Federal Rules of Criminal Procedure, cited *supra,* would completely answer the third claim of error now asserted by appellant. Inasmuch as both points two and three are covered by Rule 30, appellee, for the purpose of avoiding repetition requests the Court to reconsider the argument made under point two, insofar as it is applicable to point three.

While it is true that it is the duty of the court, whether request be made or not, to instruct on each and every essential question in the case so as to properly advise the jury of the issues, it cannot be successfully contended that there is any duty on the part of the court to instruct on an issue foreign to the record upon which there is no evidence. There was

no issue of self defense presented in the trial court. It is shown by appellant's own testimony, and by that of four other witnesses, that he provoked the altercation, that he challenged or invited Rowley to fight and that he then voluntarily and willingly engaged in the combat.

Where the accused invites the prosecuting witness to engage in a fight, self-defense cannot be set up in a prosecution for aggravated assault, and a similar rule applies where the accused fights willingly although he did not provoke the difficulty.

6 C. J. S., Sec. 92, p. 948.
Russell v. *State,* 165 So. 256.
Adams v. *State,* 75 So. 641.
Lewey v. *State,* 182 So. 98; 28 Ala. App. 245.
Dunn v. *State,* 124 So. 744, 23 Ala. App. 321.
Carson v. *State,* 230 S. W. 997, 89 Tex. Cr. 342.

No claim of self defense was made by appellant during the trial of the case. His defense as to the crime charged in the lower court was that he had not struck Rowley with any implement (R. 418).

The failure of appellant's counsel to have requested, or the court on its own motion to have instructed, on the issue of self defense was not due to an oversight or inadvertence. That appellant's attorneys gave careful thought and study to the court's charge is evidenced by the two instructions requested and the two exceptions taken to the charge as given. The court's charge shows that the same was based upon careful thought and study. If there had been any intimation of a claim of self defense disclosed by the

testimony on the trial of the case the trial judge would have properly instructed on such issue.

It seems evident that the claim of self defense, asserted for the first time on appeal, is an afterthought which did not occur until some time subsequent to the trial. While it is apparent that there is no testimony in the record upon which a claim of self defense could be based, the reason that no such claim was asserted by appellant or his counsel in the lower court is made even more apparent from matters not appearing in the record but which were visually before the jury. From the visual comparison of the physical characteristics of Eagleston and Rowley, which the jury was entitled to make, and apparently did make, a claim of self defense would have been absurd. Rowley was a man weighing approximately 185 pounds and was approximately 5 feet 8 inches in height. Eagleston, a giant of a man, weighed approximately 245 pounds and was approximately 6 feet 4½ inches in height. In addition, it is to be noted that appellant, at the time of this altercation, was backed up by two of his employees, David Foote and George Miles.

The alleged failure of a court on its own motion properly to instruct the jury will not be considered on appeal where there was no request made for such instruction nor an exception taken to the failure of the court to have so instructed and there is no error resulting in a miscarriage of justice.

Rule 30, Federal Rules of Criminal Procedure.

Humes v. *U. S.,* 170 U. S. 210, 211.

Springer v. *U. S.,* C. C. A. 9, 148 F. 2d 411, 415.

Girson v. *U. S.,* C. C. A. 9, 88 F. 2d 358, 361.

Goon v. *U. S.,* C. C. A. 9, 15 F. 2d 841, 842.

Kempe v. *U. S.,* C. C. A. 8, 160 F. 2d 406, 411.

U. S. v. *Sutter,* C. C. A. 7, 160 F. 2d 754, 757.

Watts v. *U. S.,* C. C. A. 5, 161 F. 2d 511.

Skiskowski v. *U. S.,* C. C. A. D. C., 158 F. 2d 177, 183.

Jarabo v. *U. S.,* C. C. A. 1, 158 F. 2d 509, 514.

Spevak v. *U. S.,* C .C. A. 4, 158 F. 2d 594, 598.

The language of this Court in *Goon* v. *U. S., supra,* is apropos to the court's charge in the present case, "As to the second objection, no request was made for an instruction pointed to the theory of the defense. *The Instructions covered the law of the case. They were judicial, dispassionate and fair to the defense.*" [Italics supplied.]

The court's charge, when considered in its entirety, correctly instructed the jury on each essential question presented by the evidence. There is no idication that any substantial right of appellant was affected and this asserted claim of error should not now be considered.

Fourth point raised: 4. The court did not err in allowing photographs of the injured man's head to be introduced in evidence

For the purpose of showing the nature and character of the injuries sustained, it is competent to prove the physical condition of the person assailed at the time of, or shortly after, the commission of the assault

with which accused stands charged, and also the duration of the period of recovery.

6 C. J. S., Sec. 123, p. 989.

Bailey v. *State,* 24 Ala. App. 354; 135 So. 407.

Jackson v. *State,* 19 Ala. App. 399; 97 So. 260.

People v. *Lathrop,* 49 Cal. App. 63; 192 P. 722.

Paschal v. *State,* 30 Ga. App. 22; 116 S. E. 899.

State v. *Henggeler,* 312 Mo. 15; 278 S. W. 743.

State v. *Allen,* 246 S. W. 946.

Bone v. *State,* 43 Okla. Cr. 360; 279 P. 363.

Garza v. *State,* 102 Tex. Cr. 241; 277 S. W. 382.

State v. *McDonie,* 89 W. Va. 185; 109 S. E. 710.

State v. *Johnson,* 23 Wash. 2d 751; 162 P. 2d 440, 441.

For the purpose of showing that the weapon used was in fact a dangerous weapon, evidence is admissible to show the nature, character and extent of the injuries inflicted by it and the assault.

6 C. J. S., Sec. 123, pp. 989, 990.

Bone v. *State,* 43 Okla. Cr. 360; 279 P. 363.

People v. *Manning,* 320 Ill. App. 143; 50 N. E. 2d 118, 120.

State v. *Quong,* 8 Idaho 91; 67 P. 491.

State v. *Young,* 53 Or. 227; 96 P. 1067.

In the *Manning* Case, *supra,* the defendant was convicted of assault with a deadly weapon, the weapon being a crank handle. In reversing the case on other grounds, the Court in its opinion stated:

The cause will be remanded and in aid of a new trial we wish to point out that courts in foreign jurisdictions in cases cited, some of which we refer to, approve admitting medical testimony of the extent and the degree of permanency of injuries of the person assaulted. *State* v. *Allen,* Mo. Sup., 246 S. W. 946; *People* v. *Lathrop,* 49 Cal. App. 63; 192 P. 722; *State* v. *Haynie,* 118 N. C. 1265, 24 S. E. 536; *Jackson* v. *State,* 19 Ala. App. 339, 97 So. 260. The theory is that such evidence is admissible to show the weapon used was dangerous and to show also the character of the assault. The reason for the rule would appear to be that the jury cannot know the force of the blow without knowing the effect and the effect here was not alone knocking Caputo to the ground. Likewise, with the jury looking back from the injuries, it can better determine the character of the act, despite the fact that the crank handle itself might be an indication of the character. The injuries following the blow, while not strictly a part of the offense, shed light upon the results of assault with a truck crank handle and afford a fair estimate of the deadliness of the instrument as well as the quality of the intention. These reasons justify the rule and defendant here, judging from the record, was not prejudiced. Since the testimony is admissible, we see no objection to the doctor testifying, in addition to Caputo, to the injuries received. The doctor was better qualified to do so.

Evidence may be introduced to show the nature, character, and extent of the injuries sustained as indicative of the intent with which they were inflicted.

6 C. J. S., Sec. 116, p. 980.

People v. *Manning,* 320 Ill. App. 143; 50 N. E. 2d 118.

State v. *Compton,* 31 S. D. 430, 205 N. W. 31.

A photograph, proved to be a true representation of the person, place or thing which it purports to represent, *is competent evidence of anything for which it is competent for a witness to give a verbal description.* The question of admissibility rests largely in the discretion of the trial court. If a photograph can throw light on the subject of inquiry more clearly than oral testimony could, it may be properly admitted. [Emphasis supplied.]

Madden v. *U. S.,* C. C. A. Cal., 20 F. 2d 289.

Viliborghi v. *State,* 43 P. 2d 210; 45 Ariz. 275.

People v. *Shaver,* 7 Cal. 2d 586; 61 P. 2d 1170.

State v. *Walsh,* 72 Mont. 110; 232 P. 194.

State v. *Williams,* 50 Nev. 271; 257 P. 619.

State v. *Nelson* (Ore.), 92 P. 2d 182.

State v. *Whitzell,* 175 Wash. 146; 26 P. 2d 1049.

23 C. J. S., Sec. 852, pp. 51, 52.

When it is material to the issues, a photograph of deceased, or of his body or parts thereof, is admissible in a prosecuton for homicide, although the picture has a gruesome or shocking aspect and tends to excite the passion or prejudice of the jury; but such photographs should be excluded if they are unnecessary and introduced for the purpose of inflaming

the jury's emotions. It is within the discretion of the trial court to determine whether or not such a photograph is admissible. Photographs of a person deceased, or of a body, have been held admissible for the purpose of identification, or to show the condition of the victim's body, *or to indicate the nature or extent of wounds or injuries.* [Emphasis supplied.]

23 C. J. S., Sec. 852, pp. 53, 54.

Young v. *State,* 38 Ariz. 298; 299 P. 682, 685.

Janovich v. *State,* 32 Ariz. 175; 256 P. 359, 360.

People v. Dunn, 177 P. 2d 553, 556.

People v. *Goodwin,* 9 Cal. 2d 711; 72 P. 2d 551, 553.

People v. *Harris,* 219 Cal. 727; 28 P. 2d 906, 908.

People v. *Ferlin,* 203 Cal. 587; 265 P. 230, 235.

People v. *Russo,* 133 Cal. App. 468; 24 P. 2d 580, 582.

State v. *Dennis,* 177 Ore. 72; 159 P. 2d 839, 858.

State v. *Nelson,* 162 Ore. 430, 92 P. 2d 182, 191.

State v. *Payne,* 25 Wash. 2d 407; 171 P. 2d 227, 231.

State v. *Smith,* 196 Wash. 534; 83 P. 2d 749, 752.

State v. *Eggleston,* 161 Wash. 486; 297 P. 162, 164.

In the case of *Jarabo* v. *U. S.* (C. C. A. 1), 158 F. 2d 509, 513, the Court in its opinion stated in part:

> The appellant's present complaint with respect to the admission of evidence is that the

> court below allowed the Government to introduce as physical exhibits a number of pornographic photographs of the type referred to in a summary of the evidence in the second count except that the women appearing in them were not named in any count of the indictment. He says that these photographs of strangers to any charge layed against him were unnecessary, immaterial, and irrelevant, confused the issue, were calculated to "inflame the emotions and passions of the jury" and were so numerous that the court abused its discretionary powers in admitting them. * * *
>
> To be sure, photographs constitute rather more dramatic evidence than oral testimony, and the photographs objected to are numerous and many of them are lurid and revolting. We cannot deny their capacity to incite some prejudice against the appellant. But, nevertheless, considering them in connection with the oral testimony, we are not prepared to say that the court below abused its discretion in admitting them. We cannot say that their prejudicial effect so far outweighs their probative value that as a matter of law they should not have been admitted in evidence.

In the case of *State* v. *Nelson, supra,* in a well considered opinion by the Supreme Court of the State of Oregon sitting *In Banc,* we find the following statement:

> Although a photograph might be prejudicial because of its so-called gruesome character, it is nevertheless admissible in evidence if material to some issue in the case. *State* v. *Weston,* 155 Or. 556, 64 P. 2d 536, 108 A. L. R. 1402;

State v. *Weitzel,* 157 Or. 334, 69 P. 2d 958; *2 Wigmore on Evidence,* Sec. 1157; *Commonwealth* v. *Retkovitz,* 222 Mass. 245, 110 N. E. 293; *State* v. *Gaines,* 144 Wash. 445, 258 P. 508. A photograph of a dead body is properly admitted when it is material for the sole purpose of explaining and demonstrating the testimony of expert medical witnesses. *State* v. *Weston, supra; State* v. *Clark,* 99 Or. 629, 196 P. 360; *Commonwealth* v. *Winter,* 289 Pa. 284, 137 A. 261; *Carnine* v. *Tibbetts,* 158 Or. 21, 79 P. 2d 974. The photograph described in State's Exhibit O is not gruesome or prejudicial. *State* v. *Weston, supra; State* v. *Clark, supra. State* v. *Miller,* 43 Or. 325, 74 P. 658, cited by defendant, has been distinguished and is not in harmony with *State* v. *Weston, supra.* See, also, *State* v. *Finch,* 54 Or. 482, 103 P. 505, and *State* v. *Clark, supra,* where the case of *State* v. *Miller, supra,* is distinguished.

The arguments which defendant presents to the effect that State's Exhibit O was improperly admitted because it was a gruesome photograph, find answer in *State* v. *Weston, supra.* In that case the court, speaking by Mr. Justice Rossman, gave a very complete analysis of the law applicable to so-called "gruesome" exhibits. The opinion and authorities there set forth, it is believed, constitute a clear showing that the court committed no error in the present case in admitting in evidence State's Exhibit O. The defendant's argument rests entirely upon the assumption that error was committed, unless State's Exhibit O was necessary to prove some point in the case, and that since the fact proved by that exhibit was proved by the testimony of

expert witnesses, it was unnecessary. The answer to this contention is that such is not the law, as established in this state, not only by *State* v. *Weston, supra,* but also by other decisions. The rule of law is that exhibits of this character, sometimes known as real evidence, are admissible if they are material as evidence. In *State* v. *Weston* the court enters into a discussion of this particular question. In 155 Or. at page 575, 64 P. 2d at page 543, the court quotes from *Wigmore on Evidence,* 2d Ed., Sec. 1157, to the effect that evidence of this kind should be admitted if material, whether or not there is possible ground for prejudice due to the gruesome character of the exhibit. At pages 575 to 578, the court cites a number of cases involving the propriety of the admission in evidence of photographs of dead bodies. In all of those cases it was held that no error was committed in admitting such photographs where the exhibits were material in the proof of some part of the state's case. The rule is well summarized in a quotation from *Commonwealth* v. *Rethovitz, supra,* where the court said (222 Mass. 245, 110 N. E. 294): "Competent and material evidence is not to be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible." See, also, *State* v. *Gaines, supra,* and *State* v. *Weitzel, supra,* where the court held, without comment, that a photograph was properly admissible in a case of assault with intent to commit rape, the photograph showing the condition of the prosecutrix the morning after the assault.

In *State* v. *Cunningham,* 144 P. 2d 303, 311, Oregon, the court, with reference to *State* v. *Miller,* relied upon by appellant and cited in his brief at pages 30 and 31, stated:

> We have examined both the coat and the shirt. We do not believe that either is gruesome. Nothing connected with a murder trial—guns, bullets, blood-stained clothing—is pleasing to the eye or touch; but the shirt and coat do not provoke sympathy for the deceased nor cry out for reprisal. If either could be deemed gruesome, that circumstance in itself would not have excluded it from reception as evidence. *State* v. *Nelson,* 162 Or. 430, 92 P. 2d 182; *State* v. *Weitzel,* 157 Or. 334, 69 P. 2d 958; *State* v. *Weston,* 155 Or. 556, 64 P. 2d 536, 108 A. L. R. 1402; and *Wigmore on Evidence,* 3rd Ed. Sec. 1157. Those authorities we deem controlling, rather than *State* v. *Miller,* 43 Or. 325, 74 P. 658, upon which the defendant relies. * * *

The transcript of record reflects that plaintiff's exhibits 7, 8, 9, and 10 were admitted for the purpose of showing in part the condition caused by the alleged wound—or the wound suffered by Mr. Rowley from whatever cause (R. 154). With reference to exhibit No. 7, appellant's counsel stated, "The severity of the injury and the operation and all that has nothing to do with this case. *It is material to show the direct results of any blow that might have been struck,* but not to arouse passion and prejudice by photographs of blood and bones." Appellant's counsel is incorrect in his statement that the severity of the injury

had nothing to do with the present case. The nature and exent of the injuries were clearly admissible to show intent, to show the dangerous nature of the implement used and to show the nature and character of the assault. Inasmuch as this evidence was admissible by testimony of witnesses it follows that a photograph on the same subject showing the nature and extent of the injuries was likewise competent. In this connection, it is submitted that Exhibits 7, 8, 9, and 10 afforded the jury a clearer, more lucid description of the location, nature and extent of the injury suffered by Rowley than do the spoken words "a 3¼-inch depressed crescentic shaped laceration of the scalp near the top of the head, lying a little to the right side" (R. 296). These exhibits convey these facts to the jury so ably, and more adequately than words, that there was no necessity to call witnesses to endeavor to describe the injury and the extent thereof.

It is to be noted that plaintiff's exhibits 7, 8, 9, and 10 were admitted into evidence by the Court sometime prior to 5 p. m. on November 5, 1946. The jury retired to consider the verdict at 12:30 p. m. some 9 days later on November 14, 1946. The record reflects that the only time said photographs were exhibited to the jury was at the time of their being admitted into evidence on November 5, 1946. At that time the court very carefully and appropriately cautioned the jury as to the manner in which these exhibits were to be considered. It may be presumed, in the absence of a showing to the contrary, that the jury followed the court's instructions.

Appellant contends that because exhibits 7, 9, and 10 were shown to the jury at the outset of the trial and withdrawn at the close thereof clearly demonstrates that the U. S. Attorney's only purpose in offering the photographs was to excite prejudice and horror in the minds of the jury. To the contrary it appears that the U. S. Attorney took every precaution to avoid the possibility of influencing the jury with exhibits 7, 9, and 10. They were introduced for the legitimate purpose of showing the nature and extent of the injury received by Rowley. After this evidence had been conveyed to the jury the exhibits were withdrawn prior to the jury's retiring to avoid any possibility of appellant claiming that the photographs had influenced the jury during their deliberations.

If, as asserted by appellant, the U. S. Attorney's sole purpose in introducing these photographs was to prejudice the jury, he would have maneuvered to have those photographs flashed before the jury constantly throughout the trial and would have insisted, above everything else, that these photographs be with the jury during their deliberations.

While exhibit 8, which did go to the jury, does not show the extent of the injury, it does show its location. In addition, it is mute evidence of a conclusive nature as to the identity of the implement used. The area in exhibit 8 between the two hemostats is the original ragged wound and was not made by a knife. This crescentic shaped wound is approximately 3¼ to 3½ inches in length (R. 302). A comparison of this 3¼ or 3½ inch crescentic shaped wound with the end of

802610—48——3

the rake, introduced as plaintiff's exhibit 6 (R. 150), reveals that they are nearly identical.

In the case of *Simpson* v. *U. S.,* C. C. A. 9, 289 F. 188, this Court in passing upon the question of the error in admission of evidence claimed to be prejudicial, in an appeal taken from the District Court of the First Division, Territory of Alaska, in its opinion stated as follows:

> In reviewing a judgment in an appellate court the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial; *Rich* v. *United States,* 271 Fed. 566; *Trope* v. *United States,* 276 F. 348; *Hall* v. *United States,* 277 F. 19; *Haywood* v. *United States,* 268 F. 795. In the last case cited, Judge Baker, referring to Act of February 26, 1919, amending Judicial Code Sec. 269 (Comp. St. Ann. Supp. 1919, Sec. 1246), said: "We gather the Congressional intent to end the practice in holding that an error requires the reversal of the judgment, unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he had been denied some substantial right whereby he has been prevented from having a fair trial."

See also:

Maron v. *U. S.,* C. C. A. 9, 18 F. 2d 218, 219.

Lonergan v. *U. S.,* C. C. A. 9,, 98 F. 2d 591, 595.

Allred v. *U. S.,* C. C. A. 9, 146 F. 2d 193, 196.

An impartial consideration of the record reflects that appellee's exhibits 7, 8, 9, and 10 were properly admitted in evidence for a legitimate purpose—that of showing the nature and extent of the injury sustained by Rowley from which the jury could infer the physical condition of Rowley shortly after the assault, the dangerous nature of the weapon used, and the intent with which the assault was made. The trial judge and prosecuting attorney took every reasonable precaution to protect appellant from any possible prejudice that might result thereby. There is no indication that the appellant was prejudiced by the introduction of such photographs.

Fifth point raised: 5. The court did not abuse its discretion in overruling appellant's motion for new trial

The affidavit of the United States Attorney in opposition to appellant's motion for new trial (R. 31–35), which is not controverted, shows that the United States Attorney was not guilty of any misconduct before the grand jury nor was any material evidence improperly withheld.

A motion for a new trial is addressed to the sound discretion of the trial judge. It is well established that error may not be assigned to the trial court's ruling on a motion for new trial.

Rasmussen v. *U. S.,* C. C. A. 9, 8 F. 2d 948, 950.

Freihage v. *U. S.,* C. C. A. 9, 56 F. 2d 127, 135.

Goldstein v. *U. S.,* C. C. A. 9, 73 F. 2d 804, 807.

Sutton v. *U. S.,* C. C. A. 9, 79 F. 2d 863, 865.

Rourbay v. *U. S.,* C. C. A. 9, 115 F. 2d 49, 50.

Utley v. *U. S.*, C. C. A. 9, 115 F. 2d 117, 118.
Banks v. *U. S.*, C. C. A. 9, 147 F. 2d 628, 629.

Sixth point raised: 6. The indictment stated facts sufficient to constitute a crime and the trial court had jurisdiction over the offense charged

(a) The sufficiency of the indictment

When the indictment in the present case is viewed in the light of practical, instead of technical, considerations, the sufficiency thereof becomes apparent. It contains facts which inform appellant that he is accused of the crime of assault with a dangerous weapon with sufficient detail to enable him to prepare his defense and to prevent the appellant from being prosecuted a second time for the same offense.

In *Evans* v. *U. S.*, 153 U. S. 584, 590, the Court stated:

> While the Rules of Criminal Procedure require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty as well as to shield the innocent, and *no impractical standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove.* [Italics supplied.]

In *Melvin* v. *U. S.*, C. C. A. 2, 252 Fed. 449, 456, the Court in its opinion quoted from 2 Hale C. P. 193 as follows:

> More offenders escape by the over-easy ear given exceptions in indictments than by their own innocence and many heinous and crying

> offenses escape by these unseemly niceties to the reproach of the law, to the shame of the government, to the encouragement of villainy and to the dishonor of God.

The following cases are cited to indicate the recent trend with respect to the sufficiency of indictments since the adoption of the Federal Rules of Criminal Procedure.

In *U. S.* v. *Bickford,* C. C. A. 9, 168 F. 2d 26, the lower court held the indictment fatally defective because it did not directly aver that the officer administering the oath had competent authority to administer the same as was specifically required by 18 U. S. C. A., Section 558, under which the indictment was framed. In holding the indictment sufficient and reversing the case this Court stated:

> The criminal rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. Certainly Rule 7 (c) was not intended to be less liberal than is the modern practice of the federal courts to consider the adequacy of indictments on the basis of practical, as opposed to technical, considerations. It has long been settled in the federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the offense with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act. *Hagner* v. *United States,* 285 U. S. 427; *Berger* v. *United States,* 295 U. S. 78; *Hopper* v. *United States,* 9 Cir. 142 F. 2d 181. As observed in *Hagner* v. *United States, supra,* p. 433, "*It is enough that*

the necessary facts appear in any form or, by fair construction can be found within the terms of the indictment." Measured by these standards, the sufficiency of the indictment before us is not open to debate. [Italics supplied.]

In *Ochoa* v. *U. S.*, C. C. A. 9, 167 F. 2d 341, the appellant contended that the indictment was defective because it did not mention malice which is contained in Section 452, Title 18, U. S. C. A., under which the indictment was drawn. The indictment followed literally the form for an "indictment for murder in the first degree of federal officer" contained in the Appendix of Forms to the Federal Rules of Criminal Procedure. In holding the indictment to be sufficient this Court stated:

> The Federal Rules of Criminal Procedure have the effect of law, and Rule 58 thereof gives the Appendix of Forms official illustrative status. *The precision and detail formerly held necessary to charge an offense are no longer required.* See *Lowrey* v. *United States,* 8 Cir., 161 F. 2d 30, 35; *United States* v. *Agnew* (D. C. Penn.), 6 F. R. D. 566. It is provided that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 7 (c). [Italics supplied.]
>
> The precise point presented by appellant appears to be a novel one. In the absence of persuasive authority on the question, we have determined that the indictment is adequate because, in our view, the form employed can be considered to include all the essential facts constituting the offense; it is in harmony with

the spirit and intent of the new criminal rules; and it was prescribed by the Supreme Court, which we must necessarily assume was cognizant of the requirements of the law. Furthermore, there is obviously absent any conceivable element of prejudice to appellant in this respect. The indictment refers to the statutes which were charged to have been violated, Count I being prefaced with the citation of U. S. C., Title 18, Sections 253 and 454. The record disclosed no demurrer to the indictment nor demand for a bill of particulars—an understandable omission, since the only conclusion logically to be drawn from reading the indictment is that it charges the crime of murder in the first degree. Finally, the Court in its instructions to the jury not only explained the several degrees of unlawful homicide, but gave complete and orthodox instructions defining the terms malice and malice aforethought. The issue of malice as an essential ingredient of the crime of murder in the first degree was fully and carefully presented in these instructions.

See also:

Kramer v. *U. S.,* C. C. A. 9, 166 F. 2d 515, 519.

Frederick v. *U. S.,* C. C. A. 9, 163 F. 2d 536, 546.

Fippin v. *U. S.,* C. C. A. 9, 162 F. 2d 128, 131.

Phelps v. *U. S.,* C. C. A. 9, 160 F. 2d 626, 627.

Coagara v. *Territory of Hawaii,* C. C. A. 9, 152 F. 2d 933, 935.

U. S. v. *Josephson,* C. C. A. 2, 165 F. 2d 82, 85.

Newton v. *U. S.,* C. C. A. 4, 162 F. 2d 795, 797.

Kempe v. *U. S.,* C. C. A. 8, 160 F. 2d 406, 408.

Beauchamp v. *U. S.,* C. C. A. 6, 154 F. 2d 413, 415.

(b) The sixth amendment

Appellant has considered it necessary to devote a substantial portion of his brief, pages 35–47 inclusive, in an effort to bolster his interpretation of the meaning of the words of the Sixth Amendment, "the nature and cause of the accusation." From a comparison of that portion of appellant's brief and the oral opinion of the trial court (R. 324–338), it is evident that the trial judge was not laboring under an "apparent misconception" of the meaning of that provision of the Sixth Amendment. To the contrary, it appears that the trial judge was very well informed as to the true meaning of that provision of the Sixth Amendment and his conception is entirely in harmony with the recent decisions of this Court.

The true meaning of the words, "the nature and cause of the accusation," in the Sixth Amendment is accurately and succinctly stated in *Hagner* v. *U. S.,* 285 U. S. 427, 431:

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and "sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Sayer* v. *United States,* 157 U. S.

286, 290; *Rosen* v. *United States,* 161 U. S. 29, 34.

The *Hagner* case has been cited with approval by this Court on numerous occasions. Among these are:

U. S. v. *Bickford,* 168 F. 2d 26.
Kramer v. *U. S.,* 166 F. 2d 515.
Frederick v. *U. S.,* 163 F. 2d 536.
Phelps v. *U. S.,* 160 F. 2d 626.
Hopper v. *U. S.,* 142 F. 2d 181, 184.

In its oral opinion (R. 324–338) the trial court, in addition to the cases of *Hagner* v. *U. S., supra,* and *Hopper* v. *U. S., supra,* made reference to the case of *Myers* v. *U. S.,* C. C. A. 8, 15 F. 2d 977. Appellant contends that the *Myers* case was later, in effect, overruled by the case of *Jarl* v. *U. S.,* C. C. A. 8, 19 F. 2d 891. Assuming this statement is correct, it will be seen that the trial court correctly relied upon the doctrine pronounced in the *Myers* case in view of a recent opinion of the Circuit Court of Appeals for the Eighth Circuit. In *Lowrey* v. *U. S.,* C. C. A. 8, 161 F. 2d 30, 35, the Court expressly repudiated the doctrine of the *Jarl* case, stating:

> Such precision and detail as were held necessary to charge an offense in *Jarl* v. *United States,* 8 Cir., 19 F. 2d 891; *Corcoran* v. *United States,* 8 Cir., 19 F. 2d 901; *Partson* v. *United States,* 8 Cir., 20 F. 2d 127; *Turk* v. *United States,* 8 Cir., 20 F. 2d 129, upon which appellant relies, are no longer required.

This Court cited the *Lowrey* case with approval in *Ochoa* v. *United States,* cited *supra.*

Appellant cites the case of *Lowenburg* v. *United States,* 10 Cir., 156 F. 2d 22, and states that in that

case the Court "gets back to first principles in its opinion." It is significant to note the recent trend of the Circuit Court of Appeals for the Tenth Circuit in respect to the sufficiency of indictments, as reflected in a more recent decision, *Speak* v. *U. S.,* 161 F. 2d 562, 563. The opinion in the *Speak* case was written by Judge Huxman, who also wrote the opinion in the *Lowenburg* case. In the *Speak* case it was claimed that the information failed to state an offense because it was so general and indefinite that it failed to apprise appellant of the exact nature of the offense with which he was charged. In holding that such contention was without merit, the Court quoted Rule 7 (c) of the Rules of Criminal Procedure and stated:

> We fail to see what more could have been set out, but, in any event, if there were any details to which appellant was entitled, the lack thereof did not go to the validity of the information. That could have been furnished, if requested, by a bill of particulars.

Appellant relies implicitly upon the case of *Sutton* v. *U. S.,* 5 Cir., 157 F. 2d 661. The holding in that case can be distinguished from the present case in that it was there held that the indictment failed to charge an essential element of the offense. This circumstance is not to be found in the present case. In the *Sutton* case the Court stated:

> Turning to the information, we note that at a certain time and place the appellant had in his possession and under his control 10,000 pounds of sugar, the same being a rationed commodity. The mere possession or control of rationed sugar is not a federal offense, and yet

> the information charges no other fact unless the following words constitute an allegation of fact: "in violation of second revised Ration Order No. 3 and General Ration Order No. 8, as amended." The phrase just quoted is not an allegation of fact but a legal conclusion of the pleader; it constitutes no part of the description of the offense.

In the *Sutton* case the facts alleged could have been either lawful or unlawful depending on other facts not alleged. It is, of course, recognized that it is not sufficient to charge an offense in the language of the statute alone, where by its generality it may embrace acts which it was not the intent of the statute to punish or which may or may not constitute a crime.

In the present case the indictment charges that Z. E. Eagleston, "being then and there armed with a dangerous weapon, to wit, a long handled implement, a more exact description of said long handled implement being to the grand jury unknown and therefore not stated, did then and there wilfully, feloniously, and unlawfully make an assault upon another, to wit, Frank Rowley, with said long handled implement by then and there striking, beating, and wounding the head of the said Frank Rowley with the said long handled implement, * * *." The facts here alleged are set forth in such detail that, if proven, the accused could not be innocent.

Appellant has failed in any part of his brief to point out specifically which "essential element" of the crime of assault with a dangerous weapon is omitted in the indictment. Nor has he advanced any specific designation as to how he was misled, uninformed, or

unprepared for trial. The essential element of the crime charged is that an assault was made with a dangerous weapon and the indictment in the present case sufficiently alleges this essential element.

(c) It is presumed that the defendant is innocent of what is intended to be proved against him

Assuming the truth of the above statement, it would seem that in the present case it may also be presumed that the indictment adequately informed the appellant of the nature and cause of the accusation sufficiently to enable him to prepare his defense. Since appellant did not move against the indictment and at no time requested additional details or information, it is only logical to assume that from the indictment he knew precisely what he had to meet. The bill of particulars which was supplied appellant on November 8, 1946 (R. 45) was supplied by the Court *sua sponte* and not upon the request of appellant.

In *Ochoa* v. *U. S., supra,* this Court stated:

> The record disclosed no demurrer to the indictment nor demand for a bill of particulars—an understandable omission since the only conclusion logically to be drawn from the indictment is that it charges the crime of murder in the first degree.

In *Dunbar* v. *U. S.,* 156 U. S. 185, 191–192, the Court stated:

> Further, no objection was made to the sufficiency of the indictments by demurrer, motion to quash, or in any other manner until after the verdict. While it may be true that a defendant, by waiting until that time, does not

> waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which are run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn. If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defense, he should raise the question by some preliminary motion or perhaps by a demand for a bill of particulars; *otherwise it may properly be assumed, as against him, that he is fully informed of the precise property in respect to which he is charged to have violated the law.* [Italics supplied.]

Nothwithstanding appellant's asserted claim of ignorance, the record reveals that no substantial right of the appellant was actually prejudiced thereby. The record reflects that appellant knew from the 30th day of July 1946, that the implement with which appellant assaulted Rowley was either a shovel or rake (Plaintiff's exhibit 15–R. 345). The record also discloses that a preliminary hearing was held at which several witnesses, including Dr. Romig, David Foote, and Louis Strutz, testified. The cross-examination of witness Strutz (R. 260–285) and the re-cross-examination (R. 287–290) reflect that at such preliminary hearing appellant's counsel went to great length in an effort to ascertain the exact description of the implement used. Apparently the information thus obtained was sufficient, since appellant did not subsequently assert a lack of information until during the progress of the trial. The reporter's transcript of

testimony, which was made by a secretary of one of appellant's counsel, was available at all times approximately one week after the date of the preliminary hearing (R. 354).

Appellant's personal physician was the second physician to examine Rowley on the morning of July 30, 1946, and upon his orders X-rays were made of Rowley's head (R. 378–379). At the trial of the case he testified at length in regard to the nature and extent of the injury on Rowley's head and the cause thereof (R. 367–383). Inasmuch as Eagleston had requested Dr. Davis to attend Rowley and had stated that he would pay him for his services (R. 378), there can be little doubt that appellant knew with great detail the exact extent and nature of the injury received by Rowley within a short time after such wound was inflicted.

In this connection it seems appropriate to note the language of the Court in *U. S.* v. *Lynch,* 11 F. 2d 298, 300:

> Undoubtedly neither the district attorney nor the grand jury is required to allege facts which are unknown, especially such as should be from the very circumstances of the case best known to the accused.

(d) An indictment pleading only the words of the statute is sufficient in the case at bar

Although appellant contends that an indictment pleading only the words of the statute is not sufficient, this Court in *Jackson* v. *U. S.,* 102 Fed. 473, 483–484, in determining the sufficiency of an indictment drawn under this identical statute, held that charging the

crime in the language of the statute was generally sufficient.

> Under this assignment we will notice the point, previously urged, that the indictment does not state facts sufficient to constitute a crime, as well as the points suggested as to the insufficiency of the evidence. The indictment was drawn under the provisions of section 536 of the Oregon Code, which reads as follows: "If any person, being armed with a dangerous weapon, shall assault another with such weapon, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than ten years, or by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than one hundred nor more than one thousand dollars."

The charging part of the indictment reads as follows:

> The said Turner Jackson, at or near Skaguay, within the said district of Alaska, and within the jurisdiction of this court, on the 8th day of July in the year of our Lord 1898, being then an there armed with a dangerous weapon, to wit, a revolver charged with gunpowder and leaden bullets, and with which a mortal wound could be inflicted, did unlawfully and feloniously assault one Josias M. Tanner with said revolver, by pointing the same towards and at him, the said Josias M. Tanner, and threatening him, the said Josias M. Tanner, therewith, with the intent then and there and thereby to assault with said dangerous weapon the said Josias M. Tanner by so doing as aforesaid.

The words relating to the intent with which the weapon was drawn need not have been used and may be treated as surplusage, although as used they are not objectionable. The law is well settled that congress or the legislature of a state or territory may enact laws for the violation of which, irrespective of the criminal intent, punishment and penalty are attached. *It is the act itself, the doing of which constitutes the crime. The charging part of the indictment substantially charged the crime in the language of the statute, and this is generally held to be sufficient.* But the provisions of Hill's Ann. Laws Or. Section 1279, in addition to the provisions heretofore cited, declare that the indictment is sufficient if it can be understood therefrom: "(6) That the act or omission charged as the crime is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. (7) That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case." [Italics supplied.]

This taken in connection with the statute defining the crime, makes it perfectly clear that the indictment in the present case states facts sufficient to constitute the crime charged. It is too clear for argument that the facts are stated in such a manner as to enable a person of common understanding to know what was intended, and with such a degree of certainty as to enable the court to pronounce judgment. The essential element of the crime charged was the assault

made by Jackson upon Tanner with a dengerous weapon.

Appellant further contends that if the weapon used was a dangerous weapon, per se, then no further description is necessary, but that where the weapon alleged to have been used is not dangerous, per se, then a sufficient description of such weapon, the manner of its use and effect produced thereby should be set forth in the indictment. This Court did not draw such a distinction in the *Jackson* case nor is such a contention sustained by other authorities. It may be generally stated that the dangerous character of the weapon and the effects produced thereby are matters of proof or evidence and need not be alleged.

In *State* v. *Sims,* S. Ct. Miss., 31 So. Rep. 906, the appellant was indicted for assault and battery with intent to kill and murder. The weapon was described as a certain deadly weapon, to wit, a brick. A demurrer to the indictment was sustained and on appeal counsel for appellee urged the invalidity of the indictment. In reversing and remanding the cause the Court stated:

> The counsel as we understand him, insists that the manner in which the brick was used should be set out; but we see no more reason for such an allegation than would exist in the case of an axe, hoe, pistol, or other lethal weapon. Where the offense is committed with a deadly weapon, not prescribed by statute, no more particularity of statement is necessary than when it is committed by the use of a weapon declared deadly by statute.

In *Canterbury* v. *State,* S. Ct. Miss., 43 So. Rep. 678, the Court stated:

> Concerning the contention that the indictment should charge the specific weapon with which the assault and battery was committed, and that it was not sufficient to charge that it was committed with a deadly weapon, we merely observe, first that we have examined carefully all the authorities cited by the learned counsel for appellant and find that they do not sustain the contention; * * *.

In *People* v. *Weir,* C. A. 1st Dist. Cal., 102 P. 539, the information alleged an assault to have been made upon the person of one G. Brocks by the defendant with a certain deadly weapon, to wit, a large shovel. The defendant contended that the information did not state facts sufficient to constitute a crime in that the words, "a large shovel" were too indefinite to show that the instrument described was, in fact, a deadly weapon. The Court stated:

> In the case at bar the offense is stated to have been committed with a "deadly weapon," and, as the term "deadly weapon" has a well-recognized meaning, it was sufficient to use that term in the indictment without further description of the particular instrument employed. The cases in this state so hold.
>
> In *People* v. *Savercool,* 81 Cal. 650, 22 Pac. 856, the defendant was charged with "an assault with a deadly weapon, to wit, a revolver"; and there it was said: "Examining the information, we find that it follows the language of that section. This is all that is necessary. The ultimate or issuable facts which the statute de-

clares to constitute the offense are to be pleaded substantially in the language of the law, while probative facts, such as the intent with which an assault is made, and the 'present ability' to do it, must be proved, but need not be alleged in the information or indictment"—citing cases. "It being charged that the assault was made with a 'deadly weapon,' as the statute prescribes, it was unnecessary to have described it further as 'to wit, a revolver,' as was done. The kind of weapon was a matter of proof only." In *People* v. *Congleton,* 44 Cal. 92, it is said that an indictment for an assault with a deadly weapon with intent to do bodily injury to another may in general terms aver the assault to have been made "with a deadly weapon"; that in so doing it would but follow the language of the statute by which the offense itself is defined. In *People* v. *Perales, supra,* the Supreme Court say: "The term 'deadly weapon' has a precise, well-recognized meaning, and the nature of such weapon as being one likely to produce great bodily harm is well understood. It is expressly declared by the statute a specific means, the use of which in making an assault shall constitute an offense, and therefore, under the general rule, an assault with it may be pleaded in the language of the statute." It thus clearly appears that the information is sufficient and proper in form. The only effect of the words "a large shovel" in the information was to confine the prosecution to proof that the assault was made with the instrument described, and not with some other. *People* v. *Savercool, supra; People* v. *Carson* (Cal.) 99 Pac. 970.

In *People* v. *Oppenheimer,* 156 Cal. 733; 106 Pac. 74, 78, the Court stated:

> The information failed to specify the nature of the deadly weapon with which the assault was alleged to have been committed, alleging simply that it was done with a "deadly weapon," which is the language of the statute. This was a sufficient allegation.

In *People* v. *Petters,* Dist. Ct. App., 1st Dist., Cal., 84 P. 2d 54, appellant was convicted of assault with a deadly weapon. He contended that the trial court was "without jurisdiction over the subject of the information" and that the trial court therefore erred in denying his motion in arrest of judgment. His contention was that the information was insufficient to charge an assault with a deadly weapon under Section 245 of the Penal Code as the instruments named, to wit, a wooden club and a knife with an open blade, were not instruments defined as "deadly weapons" in Section 1168, Subdivision (2), Subsection (e) of the Penal Code. The Court in its opinion stated:

> We are therefore of the opinion that the pleading was sufficient to charge the commission of a felony under Section 245. Furthermore, it has been held at least in the absence of a demurrer to the information that it is sufficient to charge an assault with a deadly weapon in the terms of the statute without specifying the nature of the weapon used.

In *People* v. *Macias,* Dist. Ct. App., 3d Dist., Cal., 174 P. 2d 895, 899–900, appellant was convicted of assault while armed with a deadly weapon. The information alleged the deadly weapon to be "a wooden

club." Appellant contended that a wooden club is not a deadly weapon as a matter of law and that there being no allegation concerning the manner in which the club was used, the information was insufficient. He further contended that a club is a deadly weapon only under particular circumstances, and that the information failed to allege any such circumstances. The Court in its opinion stated:

> Section 952 of the Penal Code, as it now reads, after amendment in 1927 and 1929, provides that in charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.

In *Garza* v. *U. S.,* C. C. A. 5, 159 F. 2d 413, 414, the appellant was convicted upon indictment which charged a violation of Title 18, Sec. 254, U. S. C. A. Omitting formal parts, it alleged the commission of an assault upon an inspector of the Bureau of Customs of the United States Treasury while engaged in, and on account of the performance of his official duties. There was no demurrer to the indictment, no motion to quash, and no motion for bill of particulars, in the trial court. On appeal only one point was raised which dealt with the sufficiency of the court's charge

to the jury. On oral argument the sufficiency of the indictment was questioned and the court therefore considered both points. In its opinion the Court stated:

> We find no defect in the indictment. It alleges the offense in the language of the statute, which is sufficient, where, as in this case, the words of the statute contain all the essential elements of the offense. *United States* v. *Carl,* 105 U. S. 611, 26 L. Ed. 1135. It was not necessary for the indictment to contain a definition of the word assault which has a fixed and determined meaning in law. *Norris* v. *United States,* 5 Cir., 152 F. 2d 808. The defendant was fully informed of the nature and cause of the accusation against him and even if the indictment were defective in the matter of form it would be of no avail on appeal. 28 U. S .C. A. Sec. 391.

In *Tatum* v. *U. S.,* Dist. Ct. App. D. C., 110 F. 2d 555, the appellant was convicted of assault with a dangerous weapon on an indictment that she "did make an assault in and upon Dorothy M. Ragland, and * * * did maim and disfigure and that the said Carrie A. Tatum, in making the assault aforesaid did cast and throw on and upon the said Dorothy M. Ragland a certain corrosive liquid compound, commonly called lye." The code of the District provides that "every person convicted * * * of an assault with a dangerous weapon shall be sentenced to imprisonment for not more than ten years." In affirming the conviction the Court stated:

> The question is whether the indictment supports the conviction. We think it does. An indictment which "contains the elements of the offense intended to be charged," shows what the defendant must be prepared to meet, and precludes later prosecution for the offense, is good although it does not precisely follow the language of the statute.

In *Sparks* v. *U. S.,* C. C. A. 6, 90 F. 2d 61, 62, the appellant was convicted on each of four counts of an indictment which charged, in substance, that he assaulted and attacked, forcibly intimidated, obstructed, and used deadly weapons in resisting a deputy United States marshal while such deputy marshal was engaged in the performance of his official duties. The first of two questions presented on appeal was whether the indictment was defective. In its opinion, the Court stated:

> The first question was preserved for review by demurrer, which was overruled by the District Court. We deem it unnecessary to consider at length the objection that the indictment is vague and uncertain. It enables the accused to know the nature and cause of the accusation, and to plead the judgment in bar of further prosecution for the same offense. It therefore is sufficient.

In *People* v. *Moore,* App. Ct. Ill., 57 N. E. 2d 511, 512, the appellant was convicted of assault with a deadly weapon with intent to do a bodily injury. The information charged that defendant "did wilfully and unlawfully assault Pvt. Arthur Washburn with a deadly weapon, to wit, with the tines of a pitch fork,

with intent to inflict upon said Washburn a bodily injury where no considerable provocation appeared and where the circumstances of the assault showed an abandoned and malignant heart, contrary to the statute," etc. In holding the information sufficient the Court stated:

> The information was in the language of Paragraph 60 of the Criminal Code, Ch. 38, Rev. Stats. 1943, and in our opinion sufficiently charged the crime defined in such paragraph of the statute.

In *State* v. *Maggert,* S. Ct. Mont., 209 Pac. 989, 990, defendants were convicted of assault in the second degree upon an information filed in the District Court of Pondra County, charging them with the crime of assault in the first degree. The information charged the deadly weapon to be an instrument about a foot long with a knob on the striking end. The judgment of the lower court was affirmed, notwithstanding defendants' contention that the information was insufficient, in that the "deadly weapon" was not sufficiently described; that the words "an instrument about a foot long with a knob on the striking end" did not show that the weapon described was, in fact, a deadly weapon.

In *Alyea* v. *State,* S. Ct. Neb., 86 N. W. 1066, the appellant was tried upon an information charging him with making felonious assault. In sustaining the sufficiency of the information the Court stated:

> The information was framed under Section 16 (b) of the Criminal Code and charged the offense in the language thereof. But it is

> strenuously insisted that this is insufficient, since the Act creating the offense designates no particular fact or facts in defining the offense. Further, the particular facts constituting the assault should have been set forth in the information. The precise question now urged upon our attention was passed upon adversely to the contention of the learned and distinguished counsel for the prisoner in *Murphey* v. *State,* 43 Neb. 38, 61 N. W. 491; and *Smith* v. *State,* 58 Neb. 531, 78 N. W. 1059. It was ruled in those cases that in a prosecution under Section 17 (b) of the Criminal Code the information is sufficient which charges the offense in the language of the statute. The information in the case at bar follows the wording of the statute, and under those decisions which we adhere to, is sufficient in substance.

In *State* v. *Knight,* 289 Pac. 1053, 1054, the Supreme Court of Oregon sitting *In Banc* sustained a conviction of assault with a dangerous weapon under an indictment which alleged the dangerous weapon to be "a hardwood, leaded cane or walking stick."

In *Castillo* v. *State,* Court of Criminal Appeals of Texas, 124 S. W. 2d 146, the defendant was convicted of aggravated assault. His only contention on appeal was that the Court erred in declining to sustain his motion to quash the complaint and information on the ground that it was insufficient to charge the offense for which he was convicted. The information charged that an aggravated assault was committed by "striking and cutting Ignacio Cruz with a sharp instrument, the name thereof being unknown to your affiant." The Court stated:

> We are of the opinion that the complaint and information based thereon are sufficient to charge the offense, see Sec. 1581, Branc's Ann. P. O., 931. The State was not required to plead its evidence. A satement of the facts constituting the offense is sufficient.

From the foregoing authorities it is readily apparent that an indictment charging assault or assault with a dangerous weapon is sufficient if it follows the language of the statute.

(e) The United States attorney did not withhold evidence from the grand jury to the prejudice of the defendant, and the indictment returned was valid and sufficient in every respect

It is a settled rule at common law that when matters or things which are ordinarily proper or necessary to be alleged are, in fact, unknown to the grand jury or the prosecuting attorney, they may properly be so alleged in the indictment or information.

Frisbie v. *U. S.*, 150 U. S. 160.
Coffin v. *U. S.*, 156 U. S. 432.
Jewett v. *U. S.*, 100 Fed. 832.

Where the manner and means of committing an offense or the instrumentality by which it was committed are unknown to the grand jury, it may be so alleged in the indictment, provided the indictment directly and fully charges the accused with the commission of the offense.

St. Clair v. *U. S.*, 154 U. S. 134.
Jewett v. *U. S., supra.*
Alvarado v. *U. S.*, C. C. A. 9, 9 F. 2d 385.

Appellant does not contend that a more exact description of the long-handled implement was known to the grand jury but does contend that the grand

jury was prevented from ascertaining the exact description of the implement by the fact that the witness Miles was not called to testify before that body. Appellant contends that had Miles testified, the grand jury could have named the instrument and, further, that Miles' testimony had to do with an essential element of the crime, namely, the dangerous character of the weapon used.

It is difficult to perceive that Miles' testimony, to any extent, touched upon the dangerous character of the weapon used. Whether the weapon used was a shovel, rake, or other long handled implement, the dangerous nature of such weapon would be a matter to be determined by the trial jury from the manner in which it was used.

As stated by appellant, "All the testimony of the government, including that of Miles, was available to it from July 30, 1946, the date of the alleged offense, to the time of the trial" (Appellant's Brief, p. 73). A consideration of all such testimony reflects that there was no unanimity of opinion on the part of government witnesses as to the implement used by Eagleston. Numerically, the testimony of the witnesses tended to show the implement was a shovel. Miles was the only witness who definitely stated that the implement was a rake. Foote, an eye witness, testified that no blow was struck, and Strutz, an eye witness, testified that it was either a shovel or rake.

The United States Attorney quite candidly admits that, after a thorough consideration and comparison of the oral statements of various government witnesses regarding the implement used, instead of ar-

riving at a definite conclusion he was in a quandry. Although the rake, shovel, and small piece of steel had been transmitted to the Federal Bureau of Investigation laboratory for tests in an effort to establish the identity of the implement used by Eagleston, no report had been received at the time the indictment was drafted and the matter submitted to the grand jury. Subsequent to the adjournment of the grand jury, and prior to the trial, a laboratory report from the Federal Bureau of Investigation was received stating the small piece of steel had been consumed in testing and that no conclusion had been reached. Every possible effort was made to determine the exact nature of the implement used. However, it was not until approximately 12:30 on November 5, 1946, the first day of the trial, that the United States Attorney, upon the basis of an experiment performed in his presence, came to the conclusion that the implement used must have been a rake.

In view of the fact that the United States Attorney had been unable to determine which of the two implements had been used by Eagleston, prior to the time the grand jury convened, he considered it necessary, in the interests of justice, to draft an indictment under which the possibility of a fatal variance could be avoided. The allegation that a more exact description of the implement was unknown was a truthful one and was based solely upon necessity. Contrary to appellant's assertion, this allegation was not made for the purpose of withholding evidence from the appellee to gain an unfair advantage nor for the purpose of surprise.

At the request of certain members of the grand jury, the United States Attorney did cause the witness Miles to be summoned to the Federal Building to testify before that body. A majority of the grand jury elected not to hear additional witnesses. That decision was made by the members of that body during the absence of the United States Attorney from the grand jury room. Upon the conflicting testimony indicated by the record it was no more the duty of the United States Attorney to compel the grand jury to hear the testimony of Miles than it was that he insist that they hear the testimony of all the witnesses at the trial. Assuming that this had been done, the grand jury would have been in no better position to reconcile such conflicting testimony than was the United States Attorney, and the indictment would nevertheless have been returned in exactly the same language. It seems only logical to assume that the members of the grand jury might have drawn different conclusions from the testimony, even though Miles had testified, and consequently still have been unable to have arrived at a definite conclusion as to the implement used.

Appellant, after hearing all the testimony, including that of Miles, is apparently not now convinced that the implement was a rake and has arrived at the conclusion that, "there is an abundance of evidence substantiating appellant's position that Rowley's injuries resulted from a fall into the wood pile while he was sparring with appellant" (Appellant's Brief p. 7).

At the trial of the case appellant called witnesses for the specific purpose of convincing the jury that

Miles' reputation for truth and veracity in the community was uniformly bad (R. 391, 392). Inconsistent with that action, it is now asserted that the United States Attorney committed prejudicial error by not placing complete reliance upon the testimony of such a person and in not compelling the grand jury to return an indictment predicated solely upon his testimony in disregard of the testimony of other witnesses whose credibility was not attacked.

Upon the basis of the testimony disclosed at the trial of the case it would appear that had the grand jury specified a particular implement, they would have alleged the instrument to be a shovel, as did the attorneys who represented Rowley in his $55,000 damage suit against Eagleston (R. 185–188). Had this been done and, on the trial, it had been established that the implement was a rake and a judgment of acquittal had been entered upon the ground of a fatal variance, appellant would then have been satisfied that he had received a fair and impartial trial and that justice had prevailed.

Appellant's statement that "not until late in the trial of the case, was appellant apprised of the true nature of the evidence against him," is typical of numerous unfounded assertions contained in his brief. The record discloses that appellant was aware of the so-called "hidden evidence" against him from the 30th day of July 1946, and was specifically advised that the implement used was a rake on November 5, 1946, the first day of the trail. He was not put upon his defense until November 12, one week thereafter. During this interval the Court was recessed for four days.

It would seem this would have been ample to have enabled appellant to have adequately prepared his entire case.

Upon the facts known to the United States Attorney and the grand jury at the time it was in session, it was the duty of the United States Attorney to prepare an indictment alleging that the exact nature of the implement was unknown, inasmuch as that allegation truly reflected the facts. In view of the contrarity of testimony of the various witnesses it was clearly the duty of the United States Attorney to have drafted the indictment as he did to avoid the possibility of a fatal variance.

CONCLUSION

I

The trial court's instructions, when considered as a whole, correctly stated the law of the case, and were fair to the defense.

II

Photographs of Rowley's head were properly admitted for a legitimate purpose and appellant was not prejudiced thereby.

III

The indictment sufficiently charges the crime of assault with a dangerous weapon.

(a) The appellant was sufficiently informed of the nature and cause of the accusation within the meaning of the Sixth Amendment.

(b) The alleged "dangerous weapon" was described with as great a degree of particularity as was possible under the facts of the case.

(c) The exact nature of the alleged "dangerous weapon" was not known to the United States Attorney at the time the indictment was returned. The grand jury would not have been in a position to have definitely named the implement used even though they had heard every witness who testified in the trial of the case. The record does not reflect, nor has appellant pointed out, just how he was misled, uninformed or unprepared for trial.

The words of Judge Garrecht, in *Phelps* v. *U. S.*, 160 F. 2d 626, are highly appropriate in the present case,

> It was to cover cases precisely like the present, in which a convicted defendant seeks to escape condign punishment by raising technical objections, that Rule 52 (a) of the new Federal Rules of Criminal Procedure, 18 U. S. C. A., following section 687, was promulgated:
>
> "Any error, irregularity or variance which does not affect substantial rights shall be disregarded."

The indictment states facts sufficient to inform the defendant of the offense of assault with a dangerous weapon and its allegations are sufficiently certain to safeguard him from a second prosecution for the same act. Appellant's substantial rights were carefully safeguarded at all stages of the trial.

There appears to have been no error, prejudicial or otherwise, in the trial of the case, and no grounds for

a reversal of the judgment. The appellant was given a fair and impartial trial, and was found guilty of the crime with which he was charged by a jury of his peers under proper instructions and upon competent and sufficient evidence. No reason exists for upsetting the verdict of the jury, and the judgment of conviction should be affirmed.

Dated, Anchorage, Alaska, August 10, 1948.

Respectfully submitted.

RAYMOND E. PLUMMER,
United States Attorney, Anchorage, Alaska,
Attorney for Appellee.

U. S. GOVERNMENT PRINTING OFFICE 1948

No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF.

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Subject Index

I. Page

First point raised: That the trial court erred in giving to the jury Instruction 4D 1

(a) Appellee erroneously assumes, as did the trial court, that there was no issue to go to the jury as to who provoked the altercation 1

(b)(1) In discussing the court's Instruction 4D appellee completely omitted a vital part of Instruction 4D wherein the tial court wrongfully assumed that an assault had been committed by appellant..... 6

(b)(2) Appellee's explanation of the court's wrongful assumption that the parties engaged in mutual combat is not justified under the evidence. This issue was controverted and disputed and should have been resolved by the jury..... 7

II.

Second point raised: Rule 30 of the Federal Rules of Criminal Procedure should not preclude this court's consideration of erroneous Instruction 4..... 8

III.

Third point raised: Rule 30 of Federal Rules of Criminal Procedure should not be invoked on the issue of self-defense 11

IV.

Fourth point raised: The Government's use of photographs in the instant case constituted error..... 13

V.

Fifth point raised: Sufficiency of the indictment and jurisdiction of the trial court over the offense charged..... 16

VI.

Sixth point raised: Evidence was withheld from the grand jury which prevented the grand jury from returning a valid indictment 24

Table of Authorities Cited

Cases	Page
Alyea v. State, 86 N.W. 1066	17
Bowers v. State, 127 Pac. 883, 8 Okla. Cr. 277	22
Bynum v. State, 28 Ala. App. 86, 179 So. 262	3
Casperino v. Prudential Insurance Co. of Americe (Mo.), 107 S.W. (2d) 819	20
Cave v. U. S., 159 Fed. (2d) 464 (C.C.A. 8th)	9
Commonwealth v. Asheraft, 224 Ky. 203, 5 S.W. (2d) 1067	5
Fontenot v. Tremie, 19 La. App. 67, 139 So. 558	5
Girson v. U. S., 88 Fed. (2d) 358	13
Goon v. U. S., 15 Fed. (2d) 841	13
Harrison v. Commonwealth, 229 Ky. 471, 16 S.W. (2d) 471	5
Hiett v. State, 75 Okla. Cr. 190, 129 Pac. (2d) 866	5
Humes v. U. S., 170 U. S. 210	12
Jackson v. U. S., 102 Fed. 473	16
Kinard v. U. S., 96 Fed. (2d) 522 (App. D. C.)	10
Lindsey v. U. S., 133 Fed. (2d) 368 (App. D. C.)	9
Meadows v. U. S., 82 Fed. (2d) 881 (App. D. C.)	10
Miller v. U. S., 120 Fed. (2d) 968 (C.C.A. 10th)	9
Morris v. U. S., 156 Fed. (2d) 525 (C.C.A. 9th)	10
People v. King, 27 Cal. 507	18
People v. Mecias, 174 Pac. (2d) 895	19
People v. Moore, 57 N.E. (2d) 511	17
People v. Petters, 84 Pac. (2d) 54	19
Raines v. State, 73 Ga. App. 177, 36 S.E. (2d) 64	3
Skiskowski v. U. S., 158 Fed. (2d) 177	13
Smith v. State, 15 Ala. App. 662, 74 So. 755	4
Springer v. U. S., 148 Fed. (2d) 411	13

Pages

State v. Beliveau (Maine), 96 Atl. 779 22
State v. Gibson, 67 W. Va. 548, 68 S.E. 295 21
State v. Knight, 289 Pac. 1053 ..... 17, 18
State v. Leonard, 22 Mo. 449 20
State v. Robinson (Mo.), 182 S.W. 113 3

Terry v. State, 15 Ala. App. 665, 74 So. 756 5

U. S. v. Aurandt, 15 N.M. 292, 107 Pac. 1064 25
U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 ..... 18, 19
U. S. v. Rappy, 157 Fed. (2d) 964 (C.C.A. 2nd) 10
U. S. v. Rhodes, 212 Fed. 517 23

Wiborg v. U. S., 163 U. S. 632, 16 S. Ct. 1127 10

Statutes

Alaska Compiled Laws:
Section 4778 16
Section 5211 19

Penal Code of California, Section 952 19

Texts

31 C. J., Section 238, page 963 22
31 C. J., Section 265, page 713 22

Words and Phrases, pages 548, 549, 551 21

Rules

Federal Rules of Criminal Procedure:
Rule 7(c) 19
Rule 30 ..... 8, 9, 10. 11

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IN THE

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Z. E. EAGLESTON,
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vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF.

Appellee has filed herein a brief purporting to answer the points raised by appellant. In this closing brief appellant wishes to answer only such matters raised by appellee which appear to warrant a reply.

I.

FIRST POINT RAISED: THAT THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION 4D.

(a) Appellee erroneously assumes, as did the trial court, that there was no issue to go to the jury as to who provoked the altercation.

As pointed out in appellant's opening brief (p. 13) the trial court by stating:

> "It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists",

completely removed the issue of provocation and self-defense from the jury's consideration.

In his brief (pp. 6-8) appellee likewise assumes that there was no issue of provocation or self-defense in the case; that the evidence, without dispute, shows that the parties engaged in mutual combat, and that therefore the instruction was proper.

In so doing, both the trial court and appellee overlooked positive conflicting evidence as to who provoked the altercation and struck the first blow. In support of his position, appellee cites appellant's testimony at Record 417 to show that the first blows struck were struck "concurrently or simultaneously."

Appellee has entirely ignored the previous testimony of appellant at Record 416 which contains positive evidence as to who struck the first blow.

> "He stepped into the door there, and he continued to tell me: 'That is $150,' and I finally made the statement, I said: 'It is either $250 or nothing. Now don't call me a liar in my own house.'
> He stepped outside the door and said: 'You are a liar.'
> I said: 'Well, take off your glasses.'
> He took them off and laid them on a stove that is outside the door. We immediately stepped in

> —we started to sparring around. *He hit me three or four times, in the matter of a few seconds*— my wind wasn't very good. And then he kind of throwed up his left hand as he made a swing at me, and I hit him kind of a glancing blow on the left side as he turned around." (Italics ours.)

This testimony, even though it were uncorroborated, made it incumbent upon the trial court to submit the issues of provocation and self-defense to the jury for consideration under proper instructions.

> "A defendant, in a criminal prosecution for assault, is entitled to an instruction on self-defense, although his own testimony is the only testimony to support it."
>
> *State v. Robinson* (Mo.), 182 S.W. 113.

The authorities are practically unanimous in stating that where any evidence raises issues as to provocation or as to which of the parties was the aggressor, those issues must be determined by the jury.

In *Raines v. State,* 73 Ga. App. 177, 36 S.E. (2d) 64, 66, the parties engaged in a fight that involved name-calling, followed by assault with ice tongs and a whisky bottle, respectively. After discussing the evidence, the Supreme Court said:

> "We therefore hold that it was a question for the jury whether the prosecutor was the aggressor and without justification used opprobrious words attributed to him."

And in *Bynum v. State,* 28 Ala. App. 86, 179 So. 262, the Alabama court said:

> "The State's evidence tends to show that the assault was without provocation, while that for the defendant tended to prove self-defense. Both parties were drinking at the time, as were some of the witnesses. This condition probably accounts for the varying statements made by them as to what transpired. *In any event the evidence presents a jury question* * * *" (Italics ours.)

In *Smith v. State,* 15 Ala. App. 662, 74 So. 755, 756, the parties had an altercation arising out of a crap game. Concerning this situation, the Alabama court said:

> "The evidence is in conflict as to some of the details, but the tendencies were to show that after some words the parties arose from the ground, Smith started towards the door and as he passed by Sisk, Sisk grabbed Smith, throwing his left arm around his neck, crowding him back into a corner, and was striking him with his fist or a knife, when Smith shot him. The other tendencies were that when the dispute arose, Sisk called Smith a 'damn liar', Smith repeating the same epithet to Sisk, when they went together and a pistol was fired."

The trial court instructed as follows:

> "If you believe from all the evidence in this case, beyond a reasonable doubt, that Milton Smith, either by words or deed, provoked or encouraged the difficulty, then he cannot claim self-defense."

In holding this instruction erroneous, the reviewing court said (p. 756):

"The question as to whether the conduct of the accused is wrongful, and whether it brought on, provoked or encouraged the difficulty, is one of fact for the jury."

To the same effect:

Terry v. State, 15 Ala. App. 665, 74 So. 756, 758;

Hiett v. State, 75 Okla. Cr. 190, 129 Pac. (2d) 866;

Fontenot v. Tremie, 19 La. App. 67, 139 So. 558, 559;

Commonwealth v. Ashcraft, 224 Ky. 203, 5 S.W. (2d) 1067;

Harrison v. Commonwealth, 229 Ky. 471, 16 S.W. (2d) 471, 472.

Commonwealth v. Collberg and other cases cited by appellee in his brief (pp. 6, 7) clearly define "mutual combat" and its effect on a prosecution for assault and battery, but in none of those cases did the trial court, in giving its definition of mutual combat to the jury, attempt to deprive the jury of its prerogative of determining the issues of self-defense, provocation and which of the parties was the aggressor.

Each of these issues necessarily remains a jury question. None of them were submitted to the jury in the instant case. In fact, both the court's instruction and appellee's contention in his brief affirmatively remove these issues from the jury's consideration.

(b)(1) In discussing the court's Instruction 4D appellee completely omitted a vital part of Instruction 4D wherein the trial court wrongfully assumed that an assault had been committed by appellant.

Instruction 4D, as given by the trial court, reads as follows:

> "Even if you should believe that Rowley called the defendant a liar, in words or substance, on the day of and before the alleged commission of the crime charged in the indictment, the use of such words by Rowley and his application of them to the defendant would not justify an assault by the defendant upon Rowley, whether the defendant was or was not then armed with a dangerous weapon.
>
> It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States." (T.R. 11.)

Appellant made timely objection at the trial to the giving of this instruction. (T.R. 23.)

In the first paragraph of this instruction (as pointed out in appellant's opening brief, p. 15) the trial court clearly assumed and informed the jury that an assault had been committed by appellant upon appellee. *This vital paragraph is neither cited, quoted, nor discussed in appellee's brief.*

(b)(2) Appellee's explanation of the court's wrongful assumption that the parties engaged in mutual combat is not justified under the evidence. This issue was controverted and disputed and should have been resolved by the jury.

In discussing the second paragraph of the quoted instruction, supra, appellee, like the trial court, again assumes that there is no conflict in the evidence—that an *agreed* mutual combat was clearly established by uncontradicted evidence.

As pointed out in the preceding section of this brief, this contention is not in accord with the evidence, and the issues of mutual combat, provocation and self-defense should have been submitted to the jury.

The authorities cited on page 9 of appellee's brief for the proposition that mere words will not justify an assault and battery, are correct. Instead, however, of being used in defense of the instruction in question, these authorities should have been used by the trial court in setting forth an accurate statement of the law when submitting the issue of provocation to the jury.

On pages 10 and 11 of his brief, appellee argues that the charge of the trial court, taken as a whole, cures the errors contained in Instruction 4D. However, he cites no portion of the court's instructions that tends in any way to remove the wrongful assumption that an assault had been committed and that mutual combat existed—both of which issues should have been resolved by the jury. Appellee does quote a portion of the instruction in which the trial court admonished the jury to disregard any comments or opinions which the trial court may have expressed on

the facts, and he cites a number of cases (p. 11) purporting to hold that improper assumptions may be cured by instructions to disregard judicial comment on the facts. An examination of these cases, however, shows that they deal only with the effect of a trial court's *comment* on evidence as distinguished from a *wrongful assumption of fact* by the court. Appellant agrees that the trial court has the right to comment and express its opinion on the evidence adduced. *Instruction 4D, however, was not a comment on evidence or an expression of opinion thereon. It constituted a definite assumption of material facts by the trial court which should have been resolved by the jury.*

II.

SECOND POINT RAISED: RULE 30 OF THE FEDERAL RULE OF CRIMINAL PROCEDURE SHOULD NOT PRECLUDE THIS COURT'S CONSIDERATION OF ERRONEOUS INSTRUCTION 4.

In his opening brief (pp. 21-24) appellant cited a great deal of responsible authority showing that an instruction such as that given by the trial court in Instruction 4 constituted prejudicial error. On page 13 of his brief, appellee denies that prejudicial error was made by giving this instruction, but cites no authorities whatsoever to substantiate this position. We may, therefore, assume that this instruction is prejudicial in fact.

Appellant is thoroughly familiar with the authorities cited by appellee under Rule 30 of the Federal Rules of Criminal Procedure and concedes that under

normal proper practice appellant should have specifically objected to this erroneous instruction. His failure to do so, however, does not preclude this Court from considering this prejudicial error, and appellant contends that he is entitled to the benefit of such consideration.

In numerous cases the Federal Appellate Courts have, notwithstanding Rule 30, considered an erroneous prejudicial instruction and reversed convictions where objections were not made by appellant at the trial court.

In *Miller v. U. S.,* 120 Fed. (2d) 968, 972 (C.C.A. 10th), the court said:

> "Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court * * * or even where the error was not preserved for review by proper objection, exception or assignment."

And in *Cave v. U. S.,* 159 Fed. (2d) 464, 469 (C.C.A. 8th), the court said:

> "Notwithstanding this rule (Rule 30) in criminal cases involving life or liberty of a defendant, an appellate court may notice plain and seriously prejudicial error in the trial, even though not assigned as error." (Parenthesis added.)

In *Lindsey v. U. S.,* 133 Fed. (2d) 368, 375 (App. D. C.), the court, in following the same principle and reversing the judgment because the instructions were erroneous and prejudicial, even though there was a failure to seasonably object to the instruction, stated:

> "The crimes with which the appellant is charged are of extremely grave character. * * * No verdict of guilt can properly be reached under our system of law without a trial in which the rights of the defendant which are guaranteed by the law are adequately protected. For the reasons set out above, I think that they were not protected in this case because * * * the instructions were out of balance."

To the same effect:

Meadows v. U. S., 82 Fed. (2d) 881, 884 (App. D. C.);

Kinard v. U. S., 96 Fed. (2d) 522, 526 (App. D. C.);

Wiborg v. U. S., 163 U. S. 632, 658, 16 S. Ct. 1127;

U. S. v. Rappy, 157 Fed. (2d) 964, 967 (C.C.A. 2d).

This Court has likewise disregarded failure of a defendant to object to palpable error in instructions by the trial court. In *Morris v. U. S.,* 156 Fed. (2d) 525, 527 (C.C.A. 9th), where the trial court failed to instruct on certain statutes and regulations and there was no assignment of error made at the trial, this Court nevertheless considered the error and reversed the judgment, stating:

> "In a criminal case, it is always a duty of the court to instruct on all essential questions of law, whether requested or not."

It is thus apparent that this Court has the inherent power, notwithstanding the provisions of Rule 30, to

consider the erroneous Instruction 4 and to reverse the conviction if it is found to be prejudicial.

The crime charged against appellant is certainly a serious one. The penalty meted out was sereve. Appellant earnestly contends that this Court should exercise its inherent power and consider this instruction.

III.

THIRD POINT RAISED: RULE 30 OF FEDERAL RULES OF CRIMINAL PROCEDURE SHOULD NOT BE INVOKED ON THE ISSUE OF SELF-DEFENSE.

Appellee contends that Rule 30 of Federal Rules of Criminal Procedure again precludes appellant from complaining that the trial court failed to instruct on the issue of self-defense. As heretofore pointed out the trial court, by giving Instruction 4D, erroneously removed the issue of self-defense from the jury. Instruction 4D was expressly objected to by appellant. (T. R. 23.) Accordingly it would have been futile for appellant to request an instruction on self-defense when the court had expressly removed that issue from the jury.

Appellee further contends (brief p. 17) that self-defense may not be urged in cases of mutual combat and cites authorities to substantiate this position. He also contends that no claim of self-defense was made by appellant.

Appellant calls the Court's attention to the arguments heretofore presented in this and in his opening

brief to the effect that the issues of mutual combat and self-defense were present in this case and should have been submitted to the jury for a decision in view of the conflicting evidence.

In his brief (p. 18) appellee says:

> "It seems evident that the claim of self-defense, asserted for the first time on appeal, is an afterthought which did not occur until sometime subsequent to the trial."

This assertion is not borne out by the record. In his "Memorandum of Exceptions" (T. R. 22, 23) counsel for appellant stated:

> "And we except to Instruction No. 4-D on the ground that the instruction assumes on its face that the defendant was the aggressor.
> Court: Exception is, of course, noted."

As heretofore pointed out in this brief (p. 2) there is positive testimony in the record that appellee struck the first blow in the altercation. (T. R. 416.)

Appellee further contends (p. 18) that the failure of a court to properly instruct the jury will not be considered on appeal where there was no request made for such instruction or no exception taken to the failure of the court to have so instructed. In support of this contention appellee cites a number of authorities. An examination of the cases cited by appellee shows that they do not constitute authority for appellee's contention.

In *Humes v. U. S.* 170 U. S. 210, the Supreme Court observed that the instruction given by the trial court

was "explicit and unmistakable" and "full and more elaborate than the instruction requested"; the defendant could not very well, therefore, complain that his requested instruction was not given.

In *Springer v. U. S.* 148 Fed. (2d) 411, where the trial court refused to give a requested instruction on good character, it was held unprejudicial because good character was not an issue in the case. *Moreover in this case the court reiterated the rule that it was the duty of the trial court to cover all issues involved, even in the absence of a request.*

As heretofore shown, self-defense is an issue in any case of assault, and certainly was an issue in this case.

Girson v. U. S. 88 Fed. (2d) 358, likewise holds that a defendant cannot complain where all of the issues in the case are covered by proper instructions.

To the same effect:
Goon v. U. S. 15 Fed. (2d) 841;
Skiskowski v. U. S. 158 Fed. (2d) 177.

IV.

FOURTH POINT RAISED: THE GOVERNMENT'S USE OF PHOTOGRAPHS IN THE INSTANT CASE CONSTITUTED ERROR.

Appellee cites and quotes a large number of authorities for the purpose of showing that the trial court's admission in evidence of the photographs depicted in appellant's brief did not constitute error. Appellant has no quarrel with the authorities cited by appellee on this point. Appellant concedes that photographs

may be used for the purpose of showing to the jury the nature and character of an actual wound. However, as pointed out in appellant's opening brief, Exhibits 7, 9 and 10, which were introduced into evidence, exhibited to the jury and then withdrawn before the case was submitted, *were in no way related to the testimony of any witness in the case so as to show the nature or character of the actual wound.*

These three exhibits, which are before this Court for consideration (Appendix, Appellant's Opening Brief) in no way illustrate the nature or character of the wound. All of the photographs were taken during the course of the operation on Rowley's skull; after the large T-shaped incision had been made by the surgeons, and while the resulting wound was open for surgery. An examination of the pictures clearly demonstrates that it would be impossible to ascertain from them either the size, extent or nature of the actual wound alleged to have been inflicted by appellant.

Exhibit 8, which was not withdrawn from the jury, was taken after Rowley's head was sewn up. In addition to purporting to show the length of the wound inflicted in the altercation, it shows the entire extent of the incision made by the dactors in the operation. The alleged original wound is not claimed to be more than 3½ inches in length. The incision made by the surgeons runs from the forehead to the back part of the skull and laterally toward each ear. This exhibit, which the United States attorney chose to leave in evidence, might comply with the ar-

guments advanced and the authorities cited by appellee for the legitimate use of photographs, but under no circumstances can the use of Exhibits 7, 9 and 10 be justified.

Appellee's statement in his brief (p. 29) that the United States Attorney had withdrawn Exhibits 7, 9 and 10 so as not to excite prejudice and horror in the minds of the jury, and his assertion:

> "If, as asserted by appellant, the U. S. Attorney's sole purpose in introducing these photographs was to prejudice the jury, he would have maneuvered to have those protographs flashed before the jury constantly throughout the trial and would have insisted, above everything else, that these photographs be with the jury during their deliberations."

certainly does not reflect a prosecutor's dispassionate presentation of evidence to enlighten the jury as to the nature and character of the wound in question. If the United States Attorney sincerely believed that these exhibits were not prejudicial he would never have withdrawn them from the jury before it commenced its deliberations and assigned therefor the following remarkable reason (Appellee's brief, p. 29):

> "After this evidence had been conveyed to the jury the exhibits were withdrawn prior to the jury's retiring to avoid any possibility of the appellant claiming that the photographs had influenced the jury *during their deliberations.*" (Italics ours.)

V.

FIFTH POINT RAISED: SUFFICIENCY OF THE INDICTMENT AND JURISDICTION OF THE TRIAL COURT OVER THE OFFENSE CHARGED.

The greater portion of the balance of appellee's brief is devoted to refuting appellant's contention that the indictment did not state facts sufficient to constitute a cause of action and that the trial court had, therefore, no jurisdiction over the offense charged. In reply thereto, appellant, in addition to the arguments set forth in his opening brief (pp. 34-65) wishes to comment briefly on some of the authorities cited by appellee for the purpose of showing the Court that these authorities are not applicable to the indictment in the case at bar.

In that portion of appellee's brief designated "An indictment pleading only the words of the statute is sufficient in the case at bar" (pp. 42-54) appellee argues at length that an indictment merely pleading the words of the Alaska Statute is sufficient to charge the offense.*

The authorities he cites do not bear out this contention. In *Jackson v. U. S.* 102 Fed. 473 (Appellee's brief 42-44) the offense charged was assault with a dangerous weapon contrary to the provisions of the Oregon Code which, at that time, was in force in Alaska.

" * * whoever, being armed with a dangerous weapon shall assault another with such weapon." (Sec. 4778, Alaska Compiled Laws.)

The weapon designated in that case was a "revolver charged with gun powder and leaden bullets, and with which a mortal wound could be inflicted."

This indictment charged the use of a dangerous weapon *per se* and was sufficient.

In *State v. Sims* (Appellee's brief 45-46) the alleged dangerous weapon was described in the indictment as a "brick". The defendant contended that the manner in which the brick was used should have been set out in the indictment. The court rejected this theory, stating that a brick was as much an allegation of a dangerous weapon as would be an "axe, hoe, pistol, or other lethal weapon". There is a substantial difference between describing an alleged dangerous weapon as a brick and describing it as a "long-handled implement".

In *People v. Moore,* 57 N.E. (2d) 511 (Appellee's brief 51) the alleged dangerous weapon is described as "the tines of a pitchfork". Thus the indictment particularly described a dangerous weapon.

In *Alyea v. State,* 86 N.W. 1066 (Appellee's brief 52, 53) the only offense charged was *assault.* No battery was committed and therefore no question of the use of a dangerous weapon was involved.

In *State v. Knight,* 289 Pac. 1053, 1054 (Appellee's brief 53) the alleged dangerous weapon was described as "a hardwood leaded cane or walking stick" and further alleged that the instrument was used by the defendant by striking about the head and face there-

with. In holding this indictment sufficient, the court stated:

> "We think it affirmatively appears that the hard-wood leaded cane, when used in beating a person about the head and face, was capable of producing death or great bodily harm."

In the *Knight* case the Court cited another Oregon case *(State v. Linville)* in which the alleged dangerous weapon was described as an electric flash light about a foot long and two pounds in weight. No Oregon case has been cited nor has appellant been able to find any that dispensed with the necessity of a description of the weapon, which, coupled with its use, would show it to be dangerous on the face of the indictment.

Appellee cites several California cases holding that a description of the offense, couched in the language of the statute, is sufficient and that a more particular description of the alleged weapon or the manner of its use is not required. The California cases are unique in this respect. As far back as 1865, in *People v. King,* 27 Cal. 507, it was held

> "In an indictment for murder it is not necessary to aver the means by which the murder was committed, or the nature and extent of the wound."

Compared to the particularity required in Federal indictments as set forth in *U. S. v. Cruikshank,* 92 U. S. 542; 23 L. Ed. 588, and cases following, as cited in appellant's opening brief (pp. 55-62) the following language of the California Court in the *King* case, supra, is remarkable:

> "If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

The later California cases cited by appellee *(People v. Petters,* 84 Pac. (2d) 54, and *People v. Mecias,* 174 Pac. (2d) 895) were decisions after the amendments of 1927 and 1929 to Section 952 of the Penal Code of California. In these cases the court said that the amendments to the code enabled the prosecution to plead the offense merely in the terms of the statute.

Other western states, particularly Idaho, follow the California rule, but these cases do not constitute the weight of the authority and certainly are not applicable to the Federal Rule as embodied in the *Cruikshank* case, supra, and the cases following thereunder.

The Compiled Laws of Alaska of 1933 provide (Sec. 5211) that the indictment must be true and certain as regards:

> First: The party charged;
> Second: The crime charged;
> Third: The particular circumstances of the crime charged when they are necessary to constitute the complete crime.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment "shall be a plain,

concise and definite written statement of the essential facts."

The above authorities, all cited by appellee, cannot change the fundamental rule, in Federal procedure at least, that the indictment must go further than the words of the statute and define the nature of the alleged weapon used and the manner of its use. The indictment in the instant case merely informs defandant that he, being armed with a long-handled implement, assaulted Rowley with said implement by striking, beating and wounding his head. No other facts are alleged to show that the "implement" was dangerous either in use or *per se*.

Nor can it be said that the use of the word "wounding" in the indictment cures the defect in the description of the alleged weapon. As stated, the indictment alleges that "defendant***with a long-handled implement, assaulted Rowley with said implement by striking, beating and *wounding* his head". (Italics ours.)

The definition of "wound" in criminal cases is an injury to the person by which the skin is broken.

State v. Leonard, 22 Mo. 449, 451.

> "A wound is an injury to the body of a person or an animal, especially one caused by violence, by which the continuity of the covering, as skin, mucous membrane, or conjuctiva, is broken."
>
> *Casperino v. Prudential Insurance Co. of America* (Mo.) 107 S.W. (2d) 819, 827.

To constitute a "wound" within the meaning of the West Virginia Code, there must be a complete parting of the external or internal skin.

State v. Gibson, 67 W. Va. 548; 68 S.E. 295; Words and Phrases, pp. 548, 549, 551.

So, in this case, the information furnished to the defendant by the indictment is that he struck, beat and wounded the head of Frank Rowley to the extent of "breaking the skin".

There is no allegation that Frank Rowley was dangerously or seriously injured or that he could have been.

Aside from the use of the word "dangerous" in the indictment, which as has been shown as a mere conclusion of the pleader, there is nothing alleged in the indictment to show the use of a dangerous weapon.

On page 39 of appellee's brief, after the indictment is quoted, it is stated "the facts were alleged and set forth in such detail that if proven the accused could not be innocent."

We submit that proof that the defendant assaulted Frank Rowley with a broom or umbrella or any one of many long-handled implements, and thereby inflicted a slight injury breaking the skin, would meet all of the allegations of the indictment but would not be any proof whatever of an assault with a dangerous weapon, and in such case, while the accused might not be innocent of assault and battery, he would be innocent of the charge for which he has been convicted.

It is elementary that the facts charged must be inconsistent with innocence.

> "Such facts must be alleged that if proved, the defendant cannot be innocent."
>
> 31 *C. J.* Sec. 265, p. 713.

> "A conviction cannot be sustained where all the facts stated in the indictment might be true and still accused might not be guilty of the offense intended to be charged."
>
> 31 *C. J.* Sec. 238, p. 693.

> "It is a cardinal rule of criminal pleading that an indictment must portray all the facts that constitute the crime sought to be charged so that the Court from an inspection of the indictment can say that, if all the facts alleged are true, the defendant is guilty."
>
> *State v. Beliveau* (Maine) 96 Atl. 779, 780.

Even where a doubt exists as to whether an information or indictment charges a felony or misdemeanor, the offense should be held to be a misdemeanor.

> *Bowers v. State,* 127 Pac. 883; 8 Okla. Cr. 277.

Here we have an indictment in which the facts charged are not only consistent with the innocence of the defendant of the crime charged, but if conclusively proven would not establish his guilt.

It is a general rule that no presumption is indulged in favor of a criminal pleading. While evidence might be introduced in support of the indictment which would prove the use of a dangerous weapon, the suffi-

ciency of the indictment itself does not depend upon evidence adduced in its support, but upon its contents.

Neither can it be aided by what the defendant may or may not have learned at the preliminary hearing or the various ways mentioned on pages 41 and 42 of appellee's brief. The sufficiency of the indictment must be determined by its contents, whether it be an indictment returned after a preliminary hearing or one originating with the grand jury.

On page 42 of appellee's brief, after reciting various sources of information available to the defendant, is the following statement:

> "In this connection it seems appropriate to note the language of the Court in *United States v. Lynch,* 11 Fed. (2d) 298, 300:
>
> 'Undoubtedly neither the district attorney nor the grand jury is required to allege facts which are unknown, especially such as should be from the very circumstances of the case best known to the accused.' "

But appellee neglected to recite the remainder of the quoted extract which is as follows:

> "But they must allege facts sufficient to constitute a crime, including such facts as are known, to the end that the defendant may know what he is to meet and to serve as the basis of either a plea of autrefois acquit or autrefois convict, as to further charges." Citing *U. S. v. Rhodes,* 212 Fed. 517 and other cases heretofore cited by appellant.

VI.

SIXTH POINT RAISED: EVIDENCE WAS WITHHELD FROM THE GRAND JURY WHICH PREVENTED THE GRAND JURY FROM RETURNING A VALID INDICTMENT.

Appellant's position on this point is fully set forth in his opening brief (pp. 66-73).

Appellee's argument that the grand jury, which returned the indictment in question, was justified in refusing to hear the testimony of Miles as to the character of the weapon and therefore returned an indictment describing the alleged weapon as a

> "long-handled implement, a more exact description of said long-handled implement being to the Grand Jury unknown and therefore not stated". (T.R. 2, 332.)

seems to be based on the United States Attorney's position that *he* was unable to describe the alleged weapon until after an experiment performed on the first day of the trial.

As set forth in appellant's opening brief (pp. 66-75) all of the testimony concerning the accident was in the Government's possession or available to the Government from July 30, 1946, to November 5, 1946, the latter date being the first day of the trial. There is no reason assigned as to why the experiments performed by the United States Attorney on the opening day of the trial, to determine the type of weapon used, could not have been performed by him immediately after the accident. As stated, all of the evidence was then in the possession of the Government. All of this in-

formation, including the testimony of Miles, should have been laid before the grand jury to enable it to determine the nature of the alleged weapon used. Appellant earnestly contends that the judgment or opinion of the United States Attorney should not be substituted for the knowledge of the grand jury. Miles, whose testimony was not heard by the grand jury, testified that the weapon used was a rake. The United States Attorney, after an experiment on the first day of the trial, concluded that the implement used was a rake. If the testimony of Miles and an experiment by the United States Attorney had been laid before the grand jury, it is very probable that they too would have concluded that the implement in question was a rake and not an implement "a more exact description***being to the Grand Jury unknown and therefore not stated".

It is pointed out in appellant's opening brief (pp. 66-73), an allegation containing a recital "which is to the Grand Jury unknown" is permissible only where such knowledge could not have been obtained by the grand jury by the exercise of reasonable diligence. The use of such an allegation without recourse to knowledge and information in the hands of the officers of the Government and subject to the inspection of the grand jury renders an indictment containing such a statement invalid.

U. S. v. Aurandt, 15 N.M. 292; 107 Pac. 1064, 1066.

Appellant respectfully submits that the julgment of conviction herein should be reversed.

Dated, San Francisco, California,
October 1, 1948.

Respectfully submitted,
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No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF IN SUPPORT OF SUPPLEMENT TO STATEMENTS OF POINTS UPON WHICH APPELLANT RELIES ON APPEAL.

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Subject Index

	Page
Statement of supplemental points relied upon	1
Argument	5
Point Number 21	5
Points Numbers 22 and 23	8
Point Number 24	10
Point Number 25	11
Point Number 26	12
Point Number 29	13
Point Number 30	14
Conclusion	14

Table of Authorities Cited

Cases

	Pages
Anderson v. United States, 30 Fed. (2d) 485 (CCA 5)	12
Arine v. United States, 10 Fed. (2d) 778, 780 (CCA 9)	13
Crespo v. United States, 151 Fed. (2d) 44 (CCA 1)	12
Dodson v. United States, 23 Fed. (2d) 401, 403	6
Gomila v. United States, 146 Fed. (2d) 372	6, 7
Miller v. United States, 120 Fed. (2d) 698	14
Peo. v. Bender, 27 Cal. 164	11
United States v. Tatcher, 131 Fed. (2d) 1002 (CCA 3)	12

Statutes

Compiled Laws of Alaska (1933):	
Section 4778	9, 10
Section 4779	9, 10

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BRIEF IN SUPPORT OF SUPPLEMENT TO STATEMENTS OF POINTS UPON WHICH APPELLANT RELIES ON APPEAL.*

STATEMENT OF SUPPLEMENTAL POINTS RELIED UPON.

Appellant relies upon the following supplemental points:

21. That the Court erred in giving to the jury the following instruction:

> "This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment." (T.R. 7, 8.)

---

*Appellant abandons Supplemental Points on Appeal 28, 31, 32 and 33.

22. That the Court erred in giving to the jury the following instruction:

> "If the government has proved each and all of these essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime of assault with a dangerous weapon as charged within the indictment; if not, then you should consider whether the defendant is guilty of assault, not being armed with a dangerous weapon." (T.R. 8.)

23. That the Court erred in giving to the jury the following instruction:

> "The essential elements necessary for conviction of the crime of assault are as follows:
>
> First, that the crime, if any, was committed at Anchorage, Alaska, on July 30, 1946, or at any time within three years prior to October 1, 1946;
>
> Second, that at said time and place the defendant, not being armed with a dangerous weapon, did then and there unlawfully assault or threaten Frank Rowley in a menacing manner, or did then and there unlawfuly strike or wound said Frank Rowley.
>
> If you find that the defendant is not guilty of the crime of assault with a dangerous weapon as charged in the indictment, but you further find that the defendant is guilty of the crime of assault as hereinbefore defined, then you will return a verdict finding the defendant guilty of the crime of assault. But unless you find beyond reasonable doubt that the defendant is guilty of either the crime of assault with a dangerous weapon as

charged in the indictment, or of the crime of assault, then you must acquit the defendant.

The defendant can be justly convicted of assault in the event only that you find beyond reasonable doubt that the defendant unlawfully assaulted Frank Rowley and that at the time of committing such assault the defendant was not armed with a dangerous weapon.

The defendant, if the proof justifies, may be found guilty of either the crime of assault with a dangeous weapon, or of the included crime of assault, but not of both." (T.R. 9, 10.)

24. That the Court erred in giving to the jury the following instruction:

"Whether or not the defendant in this action was, at the time of the alleged assault, armed with a dangerous weapon is a question of fact which you are to determine from the evidence, and in doing so you are to take into consideration all of the circumstances disclosed by the evidence. Unless you are satisfied beyond a reasonable doubt from all of the circumstances in the case that he was armed with a dangerous weapon which, under the circumstances, was capable of producing death or great bodily injury, then you must acquit the defendant of the crime of assault with a dangerous weapon." (T.R. 10.)

25. That the Court erred in giving to the jury the following instruction:

"Part of the evidence in this case is of the kind called 'circumstantial'. Circumstantial evidence is a type of evidence in which proof is given of cer-

tain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to reason and the common experience of mankind. There is nothing in the nature of circumstantial evidence which renders it any less reliable than direct evidence. It is sometimes quite as convincing as direct and positive evidence of eye witnesses; in other cases less so. But to be of any weight or force against a person accused of crime, circumstantial evidence must be of such nature as reasonably to lead to the inference of the defendant's guilt and be more consistent with guilt than with innocence." (T.R. 12.)

26. That the Court erred in giving to the jury the following instruction:

"No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty." (T.R. 18.)

27. That the Court erred in giving to the jury the following instruction:

"To constitute the crime charged in the indictment, that of 'assault with a dangerous weapon,' the only specific intent necessary is the intent

embraced in the act of making an assault with a dangerous weapon, which is merely an intentional and unlawful use of a dangerous weapon by means of which an assault is committed with such weapon." (T.R. 13.)

* * * * * * *

29. That the Court erred in giving the three forms of verdict submitted to the jury in the numerical order in which they were given and by numbering them in the manner in which they were numbered without further instructing the jury that they were to make no inference from the fact that the instructions were so numerically given and numbered. (T.R. 20.)

30. That the Court erred in giving to the jury its instructions in that in their entirety and as a whole they failed to adequately protect the rights of appellant and were out of balance.

* * * * * * *

ARGUMENT.

POINT NUMBER 21.

The trial Court erred in giving to the jury the following instruction:

> "This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment." (T.R. 7, 8.)

The presumption of innocence is one of the fundamentals of the law. It is not to be minimized or denied to anyone accused of crime.

Dodson v. United States, 23 Fed. (2d) 401, 403.

The statement of the trial Court above quoted is not a correct statement of the law and a similar statement was so criticized as being clearly erroneous by the Circuit Court of Appeals for the Fifth Circuit in the case of *Gomila v. United States,* 146 Fed. (2d) 372, wherein the Court said:

> "In charging the jury on the presumption of innocence, the court said: 'The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each defendant, as stated, beyond a reasonable doubt, but, Gentlemen, as forceful as that rule is in protecting one charged with crime, it must never be forgotten that it was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment. The rule is but a humane provision of the law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but absolutely nothing more.'
>
> The statement that the presumption of innocence 'was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment,' is not a correct statement of the law. The presumption of innocence applies alike to the guilty and to the innocent, and the burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt, the guilt of the

accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect all persons coming before the courts charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt; and, where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence."

The fact that no objection was taken to the above-quoted charge of the trial Court does not preclude this Court from considering it on appeal, for in *Gomila v. United States,* supra, on page 376 the Court said:

"No objection was made nor was any exception taken to the court's action heretofore discussed, and the rule is invoked that the appellate courts will not consider errors urged for the first time on appeal. That these errors were committed is patent on the face of the record, and, where serious injury may result, it has many times been held that it is the duty of an appellate court to notice and correct said errors even though they were not challenged during the trial. See Lamento v. United States, 8 Cir., 4 F. 2d 901, 904; Benson v. United States, 5 Cir., 112 F. 2d 422, 423; Brasfield v. United States, 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345; United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555.

The cumulation of these errors cannot be treated as harmless, and nothing remains but to reverse and remand the case for a new trial."

POINTS NUMBERS 22 AND 23.

The trial Court erred in giving to the jury the following instructions:

(a) "If the government has proved each and all of these essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime of assault with a dangerous weapon as charged within the indictment; if not, then you should consider whether the defendant is guilty of assault, not being armed with a dangerous weapon." (T.R. 8.)

(b) "The essential elements necessary for conviction of the crime of assault are as follows:

First, that the crime, if any, was committed at Anchorage, Alaska, on July 30, 1946, or at any time within three years prior to October 1, 1946;

Second, that at said time and place the defendant, not being armed with a dangerous weapon, did then and there unlawfully assault or threaten Frank Rowley in a menacing manner, or did then and there unlawfully strike or wound said Frank Rowley.

If you find that the defendant is not guilty of the crime of assault with a dangerous weapon as charged in the indictment, but you further find that the defendant is guilty of the crime of assault as hereinbefore defined, then you will return a verdict finding the defendant guilty of the crime of assault. But unless you find beyond reasonable doubt that the defendant is guilty of either the crime of assault with a dangerous weapon as charged in the indictment, or of the crime of assault, then you must acquit the defendant.

The defendant can be justly convicted of assault in the event only that you find beyond reasonable doubt that the defendant unlawfully assaulted Frank Rowley and that at the time of committing such assault the defendant was not armed with a dangerous weapon.

The defendant, if the proof justifies, may be found guilty of either the crime of assault with a dangerous weapon, or of the included crime of assault, but not of both." (T.R. 9, 10.)

A reading of Sections 4778 and 4779 of the Compiled Laws of Alaska (1933) defining assault with a dangerous weapon and assault or assault and battery, clearly demonstrates the confusion which must have resulted in the minds of the jurors by the giving of the aforementioned instructions.

Section 4778 provides:

"Assault with a dangerous weapon.

Whoever, being armed with a dangerous weapon, shall assault another *with such weapon*" shall be punished in the manner provided by law.

Section 4779 provides:

"Assault or assault and battery.

Whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another," shall be punished in the manner provided by law.

It becomes obvious from a reading of Section 4779 that the statute covering simple assault is ambiguous

since a situation is created whereby one committing a simple assault, such as a slapping of the face but who in fact happens to be at the time armed with (having in his possession or on his person) a pen knife or a shovel or a rake, has in fact committed no crime. This incongruous situation arising from a reading of Sections 4778 and 4779 of the Compiled Laws of Alaska call for clarification by the Court in such manner as would not confuse the jury and force it to reach a conclusion calling for a verdict of guilty of assault with a dangerous weapon and precluding it from properly considering or finding a simple assault.

POINT NUMBER 24.

The trial Court erred in giving to the jury the following instruction:

> "Whether or not the defendant in this action was, at the time of the alleged assault, armed with a dangerous weapon is a question of fact which you are to determine from the evidence, and in doing so you are to take into consideration all of the circumstances disclosed by the evidence. Unless you are satisfied beyond a reasonable doubt from all of the circumstances in the case that he was armed with a dangerous weapon which, under the circumstances, was capable of producing death or great bodily injury, then you must acquit the defendant of the crime of assault with a dangerous weapon." (T.R. 10.)

This instruction is clearly erroneous because, under the provisions of Section 4778 of the Compiled Laws

of Alaska, above quoted, to be guilty of assault with a dangerous weapon the accused must not only be armed with a dangerous weapon but he must assault another *with such weapon.* The element of assault *with such weapon* is entirely left out of this instruction and it is, therefore, clearly erroneous.

POINT NUMBER 25.

The trial Court erred in giving to the jury the following instruction:

> "Part of the evidence in this case is of the kind called 'circumstantial'. Circumstantial evidence is a type of evidence in which proof is given of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to reason and the common experience of mankind. There is nothing in the nature of circumstantial evidence which renders it any less reliable than direct evidence. It is sometimes quite as convincing as direct and positive evidence of eye witnesses; in other cases less so. But to be of any weight or force against a person accused of crime, circumstantial evidence must be of such nature as reasonably to lead to the inference of the defendant's guilt and be *more* consistent with guilt than with innocence." (T.R. 12.)

The foregoing is an absolutely incorrect statement of the rule applicable to circumstantial evidence. The correct principle was stated by the Supreme Court of California in *Peo. v. Bender,* 27 Cal. (2d) 164, as follows:

> " 'That, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.' "

This rule so stated by the Supreme Court of California in universally followed in the Federal Courts.

See:

Anderson v. United States, 30 Fed. (2d) 485 (CCA 5);

Crespo v. United States, 151 Fed. (2d) 44 (CCA 1);

United States v. Tatcher, 131 Fed. (2d) 1002 (CCA 3).

To say as the Court said above that circumstantial evidence must be "*more* consistent with guilt than with innocence" is to put proof of guilt or innocence on a comparative basis and does violence to the rule requiring proof beyond a reasonable doubt.

POINT NUMBER 26.

The trial Court erred in giving to the jury the following instruction:

> "No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a *settled* conviction, based

upon the law and the evidence of the case and nothing else, that the defendant is guilty." (T.R. 18.)

A *settled* conviction is not conviction or proof beyond a reasonable doubt and this instruction, too, is clearly erroneous.

See:

Arine v. United States, 10 Fed. (2d) 778, 780 (CCA 9).

Who can say what a settled conviction is? The use of this expression tends to minimize the fundamental rule requiring proof beyond a reasonable doubt.

POINT NUMBER 29.

The trial Court erred in giving the three forms of verdict submitted to the jury in the numerical order in which they were given and by numbering them in the manner in which they were numbered without further instructing the jury that they were to make no inference from the fact that the instructions were given in such numerical order and so numbered. This objection standing alone might be deemed harmless, but it becomes prejudicial when considered with the cumulative effect of the other errors of the Court above mentioned.

POINT NUMBER 30.

The trial Court erred in giving to the jury its instructions in that in their entirety and as a whole they fail to adequately protect the rights of the appellant and were out of balance. The cumulation of the errors of the Court in its instructions as hereinabove set forth and as set forth in appellant's opening brief herein cannot be treated as harmless. The fact that no exceptions were taken to the instructions referred to in the foregoing supplemental points on appeal does not preclude this Court from examining such instructions.

See:

Miller v. United States, 120 Fed. (2d) 968 (CCA 10).

CONCLUSION.

The multiple errors assigned and set forth in appellant's opening and closing briefs and in this supplement, clearly present an array of combined injury and prejudice which we respectfully submit call for reversal.

Dated, San Francisco, California,
October 22, 1948.

Respectfully submitted.

GEORGE B. GRIGSBY,
GEORGE T. DAVIS,
HAROLD C. FAULKNER,
A. J. ZIRPOLI,
Attorneys for Appellant.

No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF IN REPLY TO APPELLANT'S BRIEF IN SUPPORT OF SUPPLEMENTAL STATEMENT OF POINTS.

RAYMOND E. PLUMMER,
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Subject Index

	Page
Opening statement	1
Argument	2
Point Number 21	2
Points Number 22 and 23	3
Point Number 24	6
Point Number 25	7
Point Number 26	10
Point Number 29	11
Point Number 30	12
Conclusion	14

Table of Authorities Cited

Cases

	Page
Boyd v. United States, 271 U. S. 104	13
Gomila v. United States, 5 Cir., 146 F. (2d) 372	2
Hargreaves v. United States, 9 Cir., 75 F. (2d) 68	13
Johnson v. United States, 9 Cir., 59 F. (2d) 42	13
McCoy v. United States, 9 Cir., No. 11,474	10
People v. Flanagan, 340 Ill. 538, 173 N. E. 155	3
Peters v. United States, 9 Cir., 94 Fed. 127	13
Shepard v. United States, 9 Cir., 236 Fed. 73	11
State v. Farnsworth, 51 Idaho 768, 10 P. (2d) 295	3
State v. Gee Jon, 46 Nev. 418, 211 P. 676	3
State v. Hanlon, 38 Mont. 557, 100 P. 1035	3
State v. Medley, 54 Kan. 627, 39 P. 227	3
Taylor v. United States, 9 Cir., 142 F. (2d) 808	13
United States v. Becker, 2 Cir., 62 F. (2d) 1007, 1010	10
United States v. Arrow Packing Corp., 2 Cir., 153 F. (2d) 669	9
United States v. Austin-Bagley Corp., 2 Cir., 31 F. (2d) 229, 234	9
Wilton v. United States, 9 Cir., 156 F. (2d) 433, 435	11

Statutes

Compiled Laws of Alaska, 1933:	
Section 4778	5
Section 4779	5

Texts

23 C. J. S., Sec. 1221, p. 782	3
23 C. J. S., Sec. 1250, pp. 808-813	19
23 C. J. S., Sec. 1321, pp. 921-925	13

Miscellaneous

Federal Rules of Criminal Procedure, Rule 52 (a)	12

No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF IN REPLY TO APPELLANT'S BRIEF IN SUPPORT OF SUPPLEMENTAL STATEMENT OF POINTS.

OPENING STATEMENT.

After this cause had been assigned for hearing on October 22, 1948, appellant filed a motion requesting the Court's permission to supplement his statement of points and for leave to file a brief in support of said supplemental statement of points. On October 22, 1948, the foregoing motion was granted and appellee was given two weeks' time in which to file a brief in reply.

Each of the supplemental points which appellant now specifies as error relate to the instructions given by the trial court. Of the numerous instructions now claimed to be erroneous appellant made timely objection to but one.

ARGUMENT.

Twenty-first point raised: 21. The trial court did not err in giving to the jury the following instruction:

> "This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment." (T. R. 7, 8.)

(a) Since timely objection was not made to this instruction this alleged error should not now be considered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) Instruction No. 3, when considered in its entirety is a correct statement of the law. A comparison of Instruction No. 3 with the instruction criticized in *Gomila v. United States,* 146 F. (2d) 372, cited by appellant, readily reveals that there is a vast difference between the two instructions. The objectionable portions of the instruction criticized in the *Gomila* case are overcome by those portions of Instruction No. 3, which read as follows:

> "It therefore becomes the duty, and it is encumbent upon the Government to prove every material element of the charge contained in the indictment to your satisfaction beyond a reasonable doubt."
>
> "The law presumes *every person* charged with crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and

until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt." (T. R. 7; emphasis supplied.)

It is proper for the Court to instruct the jury that the presumption of innocence is not intended to aid those actually guilty but to prevent an innocent person from being convicted.

23 C.J.S., Sec. 1221, p. 782;
State v. Farnsworth, 51 Idaho 768, 10 P. (2d) 295;
People v. Flanagan, 340 Ill. 538, 173 N.E. 155;
State v. Medley, 54 Kan. 627, 39 P. 227;
State v. Hanlon, 38 Mont. 557, 100 P. 1035;
State v. Gee Jon, 46 Nev. 418, 211 P. 676.

Twenty-second and twenty-third points raised: 22 and 23. The trial court did not err in giving to the jury the following instructions:

(a) "If the government has proved each and all of these essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime of assault with a dangerous weapon as charged within the indictment; if not, then you should consider whether the defendant is guilty of assault, not being armed with a dangerous weapon." (T. R. 8.)

(b) "The essential elements necessary for conviction of the crime of assault are as follows:

First, that the crime, if any, was committed at Anchorage, Alaska, on July 30, 1946, or at any time within three years prior to October 1, 1946;

Second, that at said time and place the defendant, not being armed with a dangerous weapon, did then and there unlawfully assault or threaten Frank Rowley in a menacing manner, or did then and there unlawfully strike or wound said Frank Rowley.

If you find that the defendant is not guilty of the crime of assault with a dangerous weapon as charged in the indictment, but you further find that the defendant is guilty of the crime of assault as hereinbefore defined, then you will return a verdict finding the defendant guilty of the crime of assault. But unless you find beyond reasonable doubt that the defendant is guilty of either the crime of assault with a dangerous weapon as charged in the indictment, or of the crime of assault, then you must acquit the defendant.

The defendant can be justly convicted of assault in the event only that you find beyond reasonable doubt that the defendant unlawfully assaulted Frank Rowley and that at the time of committing such assault the defendant was not armed with a dangerous weapon.

The defendant, if the proof justifies, may be found guilty of either the crime of assault with a dangerous weapon, or of the included crime of assault, but not of both." (T. R. 9, 10.)

(a) Since timely objection was not made to these instructions the alleged errors should not now be con-

sidered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) The foregoing instructions are based upon Sections 4778 and 4779, Compiled Laws of Alaska, and are a correct statement of the law. Similar provisions are to be found in the Oregon Compiled Laws Annotated, Vol. 3, Sections 23-431 and 23-432. It was certainly not the duty of the court to endeavor to legislate by instructing the jury contrary to the express terms of the statutes involved.

If, as contended by appellant, confusion had resulted in the minds of the jurors by the giving of the aforementioned instructions, such confusion would probably have been indicated by a request for additional or supplemental instructions. Such requests quite frequently occur in the trial of criminal cases where there is some doubt or confusion as to a portion of the court's charge. The fact that no additional or supplemental instructions were requested clearly demonstrates that no confusion existed in the minds of the jurors and no clarification of the court's charge was necessary.

The weapon used in this case was a garden rake and was not dangerous per se. The jury were properly instructed that whether or not the defendant was armed with a dangerous weapon was for their determination. Assuming that the jury had concluded that the manner in which the rake was used did not constitute it a dangerous weapon, they certainly were not forced to return a verdict of guilty of assault with a

dangerous weapon nor precluded from considering and returning a verdict of simple assault. If the jury had found that the defendant was using the rake as an ordinary garden implement and while holding the same in his hand he had slapped or struck Frank Rowley with his other hand he would certainly be guilty of the crime of assault or assault and battery, under the explicit terms of Instruction 4-A. (T. R. 9, 10.)

Twenty-fourth point raised: 24. The trial court did not err in giving to the jury the following instruction:

> "Whether or not the defendant in this action was, at the time of the alleged assault, armed with a dangerous weapon is a question of fact which you are to determine from the evidence, and in doing so you are to take into consideration all of the circumstances disclosed by the evidence. Unless you are satisfied beyond a reasonable doubt from all of the circumstances in the case that he was armed with a dangerous weapon which, under the circumstances, was capable of producing death or great bodily injury, then you must acquit the defendant of the crime of assault with a dangerous weapon." (T. R. 10.)

(a) Since timely objection was not made to this instruction the alleged error should not now be considered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) The foregoing instruction is a correct statement of the law. When the weapon used is not dangerous per se; or is not one declared by statute to be dangerous; or where its character depends on the manner in which it is used, the question whether there was an assault with a dangerous weapon is a question for the determination of the jury.

Appellant states that because the element of assault *with such weapon* is entirely left out of this instruction it is clearly erroneous. The complete answer to this claim of error is found in Instruction No. 4, where the court in defining the essential elements of the crime of assault with a dangerous weapon stated:

> "Second, that at said time and place the said defendant, Z. E. Eagleston, being then and there armed with a dangerous weapon, to wit, a long-handled garden rake, did then and there wilfully, feloniously and unlawfully, *make an assault* upon another person whose name is Frank Rowley, *with said dangerous weapon,* * * *" (T. R. 8; emphasis supplied.)

Twenty-fifth point raised: 25. The trial court did not err in giving to the jury the following instruction:

> "Part of the evidence in this case is of the kind called 'circumstantial.' Circumstantial evidence is a type of evidence in which proof is given of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from

> the facts testified to according to reason and the common experience of mankind. There is nothing in the nature of circumstantial evidence which renders it any less reliable than direct evidence. It is sometimes quite as convincing as direct and positive evidence of eye witnesses; in other cases less so. But to be of any weight or force against a person accused of crime, circumstantial evidence must be of such nature as reasonably to lead to the inference of the defendant's guilt and be more consistent with guilt than with innocence." (T. R. 12.)

Appellant contends that this instruction is erroneous in that it puts proof of guilt or innocence on a comparative basis and does violence to the rule requiring proof beyond a reasonable doubt. This objection seems entirely unfounded when the last paragraph of the foregoing instruction, which reads as follows, is considered:

> "In this case the proof consists of both direct and circumstantial evidence. Both should be carefully considered. It is for you to determine the weight of the circumstantial evidence as well as of the direct evidence, neither enlarging nor belittling the force of either; *and if all the evidence,* when taken as a whole and fairly candidly weighed, *convinces you beyond reasonable doubt of* the defendant's guilt, a verdict should be returned accordingly; otherwise the defendant should be acquitted." (T. R. 12; emphasis supplied.)

Where the prosecution relies solely or substantially on circumstantial evidence, or conviction may be had

on such evidence alone, the court should instruct upon the law relating to such evidence, although a specific instruction need not be given if the subject is fully covered by other instructions. Where, however, there is direct evidence sufficient, if believed, to convict, an instruction on circumstantial evidence, although there is such evidence in the case, is not necessary and properly may be refused, although it is proper to give such an instruction if the case is partially dependent on circumstantial evidence.

23 C.J.S., Sec. 1250, pp. 808-813.

The law does not require that a charge upon circumstantial evidence should be couched in any particular set of words or phrases, provided it is correct in substance and is so expressed that the jury readily can comprehend the meaning of the language employed, and provided it defines or explains circumstantial evidence and fully and concisely states the rules governing its effect, and the degree of proof required for conviction. It is proper to charge that circumstantial as well as direct evidence is legal and competent to establish accused's guilt.

23 C.J.S., Sec. 1251, pp. 814-815.

In the present case there is sufficient direct evidence, if believed, to warrant a conviction. It would appear that the court might well have omitted Instruction 4-E.

United States v. Arrow Packing Corp., 2 Cir., 153 F. (2d) 669;

United States v. Austin-Bagley Corp., 2 Cir., 31 F. (2d) 229, 234;

United States v. Becker, 2 Cir., 62 F. (2d) 1007, 1010.

See also:

McCoy v. United States, 9 Cir., No. 11,474.

However, the instruction as given does not affect any substantial right of the appellant, inasmuch as the court specifically instructed the jury that upon the evidence as a whole they must be convinced of the defendant's guilt beyond a reasonable doubt.

Twenty-sixth point raised: 26. The trial court did not err in giving to the jury the following instruction:

> "No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty." (T. R. 18.)

(a) Since timely objection was not made to this instruction the alleged error should not now be considered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) The foregoing instruction is a correct statement of the law. In *Shepard v. United States,* 9 Cir.,

236 Fed. 73, this Court approved a very similar instruction, which read in part as follows:

> "Before a verdict of guilty can be rendered, each member of the jury must be able to say, in answer to his individual conscience, that he has in his mind arrived at a *fixed opinion,* based upon the law and the evidence of the case, and nothing else, that the defendant is guilty." (Emphasis supplied.)

Appellant contends that the use of the term "settled conviction" tends to minimize the fundamental rule requiring proof beyond a reasonable doubt. However, in Instruction No. 6 (T. R. 14) the court gave a detailed explanation of the meaning of the term "reasonable doubt." Many other portions of the instructions are a constant reminder to the jury that proof beyond a reasonable doubt is required.

Under a somewhat similar situation, this Court, in *Wilton v. United States,* 9 Cir., 156 F. (2d) 433, 435, stated:

> "Appellant also complains that 'the charge amounted to a direction to find the defendant guilty if the main facts were *believed* by the jury to be true.' The point being that mere belief was sufficient as distinguished from the requirement that the belief must be beyond reasonable doubt. However, the instructions abound in expressions that such belief must be beyond a reasonable doubt."

Twenty-ninth point raised: 29. The trial court did not err in giving the three forms of verdict submitted

to the jury in the numerical order in which they were given and by numbering them in the manner in which they were numbered without further instructing the jury that they were to make no inference from the fact that the instructions were given in such numerical order and so numbered.

(a) Since timely objection was not made to this instruction (T. R. 20) this alleged error should not now be considered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) The giving of Instruction 12 (T. R. 20) in the manner given was proper. Assuming, but not admitting, that the court should have cautioned the jury that no inference was to be drawn from the manner in which the verdicts were numbered, this slight irregularity should be disregarded.

Federal Rules of Criminal Procedure, Rule 52(a).

Thirtieth point raised: 30. The trial court's instructions when considered as a whole, fairly and accurately stated the law of the case and adequately protected appellant's rights.

Provided they are consistent with each other, all instructions given in the case should be read together and construed as a whole, each instruction or the parts thereof being considered in the light of the other instructions or parts bearing on the same sub-

ject, and particular words or expressions should be construed in connection with that portion of the charge from which they are taken. If, when so construed, the instructions state the law fully, clearly, and correctly, they are sufficient, although some particular instruction or portion thereof, standing alone, might be subject to objection.

23 C.J.S., Sec. 1321, pp. 921-925.

See also:

Boyd v. United States, 271 U. S. 104;

Taylor v. United States, 9 Cir., 142 F. (2d) 808;

Hargreaves v. United States, 9 Cir., 75 F. (2d) 68;

Johnson v. United States, 9 Cir., 59 F. (2d) 42;

Peters v. United States, 9 Cir., 94 Fed. 127.

The trial court properly instructed the jury in this respect, as follows:

> "You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions." (T. R. 19.)

The trial court's instructions, when construed as a whole, fully, clearly, and correctly state the law of the case.

CONCLUSION.

Appellant's rights were adequately protected at all stages of the trial. The case was submitted to the jury under proper instructions. The verdict of the jury should be affirmed.

Dated, Anchorage, Alaska,
October 27, 1948.

Respectfully submitted,

RAYMOND E. PLUMMER,
United States Attorney,
Attorney for Appellee.

No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

CLOSING BRIEF IN SUPPORT OF SUPPLEMENT TO STATEMENT OF POINTS ON WHICH APPELLANT RELIES ON APPEAL.

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Subject Index

	Page
Introduction	1
Argument	2
Point 21	2
Points 22 and 23	2
Point 24	2
Point 25	3
Point 30	6
Conclusion	6

Table of Authorities Cited

Cases

	Pages
Gomila v. United States, 146 F. (2d) 372	2
McCoy v. United States, 169 F. (2d) 776	4
Morris v. United States, 156 F. (2d) 525, 529	1, 2
United States v. Arrow Packing Corp., 153 F. (2d) 669, 671	3

Miscellaneous

Federal Rules of Criminal Procedure, Rule 52(b)	1

No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

CLOSING BRIEF IN SUPPORT OF SUPPLEMENT TO STATEMENT OF POINTS ON WHICH APPELLANT RELIES ON APPEAL.

INTRODUCTION.

All throughout appellee's reply to appellant's brief in support of his supplemental points on appeal, appellee directs the Court's attention to the fact that appellant objected to only one of the instructions now specified as error. This fact does not preclude this Court from noticing and correcting those plain errors which affect the substantial rights of appellant even though they were not challenged in the trial Court.

Federal Rules of Criminal Procedure, Rule 52(b);

Morris v. United States, 156 F. (2d) 525.

ARGUMENT.

Point 21.

While appellee's quotation from Corpus Juris Secundum (Brief in Reply to Appellant's Brief in Support of Supplemental Statement of Points, p. 3) supports his contention that in *some* jurisdictions it is proper for the Court to instruct the jury that the presumption of innocence is not intended to aid those actually guilty but to prevent an innocent person from being convicted, this clearly is not the Federal rule. This Court in *Gomila v. United States,* 146 F. (2d) 372, referring to such instruction clearly stated that it *"is not a correct statement of the law"*.

The Court further held that such instruction constitutes patent reversible error which the Court must notice and correct even though not challenged during the trial.

Points 22 and 23.

To clarify the ambiguous language of the Alaska Statute defining simple assault is not to legislate. If the language of a statute is not sufficiently clear, the Court should explain it.

Morris v. United States, 156 F. (2d) 525, 529.

Point 24.

Appellee apparently considers that the instruction complained of in this point is erroneous, but claims that such error was elsewhere cured in the instructions. This we do not concede, because of the ambiguous nature of the instructions given on assault and because the cumulation of such errors cannot be treated as harmless.

Point 25.

There was substantial circumstantial evidence in the case. The whole theory of the case, whether the victim was struck on the head by a rake or received his wound after falling and striking his head on a shovel was, in great measure, dependent upon circumstantial evidence.

The trial Court having observed "Part of the evidence in this case is of the kind called 'circumstantial' " (T. R. 12) was thereafter obligated to give a correct instruction on circumstantial evidence. This it failed to do over objection of appellant's counsel. (T. R. 23.)

The prejudicial and reversible nature of this error is set forth in our opening brief on these supplemental points on appeal at pages 11 and 12.

Appellee's observation in his reply, page 9, that this erroneous instruction might well have been omitted has no application to the present case. This is not a case where the Court refused a requested instruction, but one in which the Court *actually* instructed and instructed erroneously. In *United States v. Arrow Packing Corp.,* 153 F. (2d) 669, 671, cited by appellee, the Court gave a correct instruction on circumstantial evidence and one which clearly supports appellant's contention that such evidence must exclude every reasonable hypothesis but that of guilt. The Court there approved an instruction that "The circumstantial evidence must be such as to exclude every reasonable hypothesis except the fact sought to be proved".

The case of *McCoy v. United States,* 169 F. (2d) 776, also cited by appellee is a case wherein the trial Court refused a requested instruction on circumstantial evidence. While the Court in that case ruled that such instruction was not essential under the circumstances it did *not* rule that a Court undertaking to instruct on circumstantial evidence can thereafter avoid the consequence of a clearly erroneous instruction. In that case the trial Court told the jury:

> "When two conclusions may be reasonably drawn from the evidence, the one of guilt and the other of innocence, the jury should reject the one of guilty and accept the one of innocence, and in that event should find the defendant not guilty. That is where two conclusions can be drawn as reasonably one way as the other, one pointing to the guilt and one to the innocence, you, of course, must indulge the presumption of innocence and draw the conclusion of innocence."

No such instruction was given by the trial Court in the instant case. No reference whatsoever was made to the principle that the accused shall be acquitted where the evidence may be reconciled with the hypothesis of innocence equally with that of guilt.

The trial Court in the instant case in saying that the circumstantial evidence must "be *more* consistent with guilt than with innocence" in effect was making the quantum of proof required a mere preponderance of evidence.

Point 30.

The charge to the jury when read as an integrated whole is unfair to appellant.

It failed to instruct on self-defense.

It removed from the consideration of the jury the issue of self-defense.

It wrongfully assumed that appellant had committed an assault on the victim.

It misled the jury by disclosing the lesser punishment for a violation of the included offense without indicating the punishment for the greater offense.

It gave ambiguous instructions on assault with a dangerous weapon and simple assault.

It erroneously instructed on the presumption of innocence.

It erroneously instructed on circumstantial evidence.

It minimized the rule requiring proof beyond a reasonable doubt.

The prejudice resulting to the appellant from the aforementioned erroneous instructions becomes even more manifest when viewed in the light of conditions existent during the course of the trial and, in particular, the use of the photographs, Exhibits 7, 9 and 10, which served no other purpose than to incite prejudice, horror, passion and indignation in the minds of the jury.

CONCLUSION.

For the reasons above stated and heretofore set forth in the prior briefs filed by appellant, the multiple errors committed by the Court below resulted in such substantial prejudice to appellant as to deny him a fair trial.

Dated, San Francisco, California,
November 15, 1948.

Respectfully submitted,
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No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Subject Index

Page

The trial court, in giving instruction 41), wrongfully assumed controverted facts 2

Instruction No. 4 2

No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Z. E. Eagleston, appellant above named, and respectfully petitions that the decision of this Court, rendered herein on the 7th day of January, 1949, be set aside and a rehearing of the cause be granted on the following grounds, to-wit:

In rendering its opinion and decision, this Court overlooked two vital and material points raised by appellant:

1. That the trial court's Instruction 4D wrongfully assumed that appellant had committed an assault upon Rowley and that appellant attempted to hit and injure Rowley with his fists, whereas these material facts were in issue, controverted and disputed and were matters to be determined by the jury (appellant's opening brief, p. 15).

2. That the trial court erred in giving to the jury Instruction No. 4 wherein the Court disclosed to the jury the lesser punishment which might be imposed by the Court for a violation of the included offense of assault, and failed to indicate to the jury the greater punishment provided for the crime charged in the indictment, to-wit, assault with a dangerous weapon (appellant's opening brief, p. 21).

THE TRIAL COURT, IN GIVING INSTRUCTION 4D, WRONGFULLY ASSUMED CONTROVERTED FACTS.

As pointed out in our opening brief (pages 15 to 20, inclusive) in giving Instruction 4D, the trial court in effect stated to the jury that *appellant committed an assault upon Rowley and attempted to hit and injure Rowley with his fists.*

The Court's assumption is contained in the following language:

> "Even if you should believe that Rowley called the defendant a liar * * * the use of such words by Rowley * * * *would not justify an assault by the defendant upon Rowley.*" (Italics ours.)

> "It is no defense to the crime charged * * * that Rowley may have voluntarily entered into a fight with the defendant, *each* attempting to hit and injure the other with his fists." (Italics ours.) (Instruction 4D T. R. 11.)

We discussed this point in our brief under the heading "First Point Raised: 1. That the trial court erred in giving to the jury Instruction No. 4D" (appellant's opening brief, p. 12).

The first portion of the argument on this point was devoted to a discussion of another point raised by appellant, namely, "By giving said instruction to the jury, the trial court erroneously deprived appellant of the right to present to the jury his theory of defense and to have the jury consider appropriately in connection therewith the vital matter of self-defense." We discussed this question of self-defense on pages 13 to 15 of our brief under subheading (a). We took up the additional discussion of the trial court's wrongful assumption of material facts in issue on pages 15 to 20, inclusive, in our brief under subheading (b).

In its opinion (page 6), this Court said:

> "A general criticism of 4-D is that it assumes on its face that appellant was the aggressor. The specific reason here assigned is that in giving this instruction the court *completely removed the issue of self-defense.*"

In the opinion the Court then considers in detail the issue of self-defense raised and discussed under subdivision (a). However, nowhere in the opinion is

any mention made of the point raised under subdivision (b) dealing with the trial court's wrongful assumption of material facts in issue. We cited numerous authorities to substantiate our position on this vital point, including a review of the cogent portions of the instructions and opinions in these cases in the appendix to our opening brief.

In omitting any mention of this point or the cases cited, we are unable to determine whether this Court intentionally or inadvertently omitted the same or considered it in any way in arriving at its decision.

INSTRUCTION NO. 4.

We discussed this vital point of appeal in our opening brief at pages 21 to 24 under heading "Second Point Raised". We contended that this instruction given by the trial court could easily have induced the jury to render a verdict of guilty of the crime charged in the indictment in the belief and on the assumption that the Court would impose the lesser punishment disclosed in the instruction, and that, as a matter of fact, the Court, on conviction, meted out the greater punishment which had not been disclosed to the jury.

We can find no mention of or reference to this point or the cases cited thereunder in this Court's opinion. Again, we are unable to ascertain whether this Court intentionally or inadvertently omitted the

same or considered it in any way in arriving at its decision.

For the foregoing reasons we respectfully submit that a rehearing be granted.

Dated, San Francisco, California,
February 2, 1949.

Respectfully submitted,
GEORGE T. DAVIS,
SOL A. ABRAMS,
ANTHONY E. O'BRIEN,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
February 2, 1949.

SOL A. ABRAMS,
Of Counsel for Appellant and Petitioner.

see vol. - 7463

No. 11547

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

RAINIER BREWING COMPANY,
A Corporation,

Respondent.

Transcript of Record

In Five Volumes

Volume I

Pages 1 to 190

Upon Petitions to Review a Decision of the Tax Court of the United States.

Rotary Colorprint, 870 Brannan Street, San Francisco

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amendment to Petition	34
Answer	31
Answer to Amendment to Petition	36
Appearances	1
Certificate of Clerk of Tax Court	603
Decision	78
Designation of Contents of Record on Review	600
Designation of Portions of Record to be Printed	599
Docket Entries	2
Findings of Fact and Opinion	37
Notice of Filing Petition for Review	84, 85
Petition	5
Petition for Review	79
Proceedings	129
Statement of Points	596
Stipulation I Re Reorganization	87
Stipulation II Re Sales of Beer Under the Name "Rainier"	116

INDEX PAGE

Stipulation III Re Filing of Income Tax Returns 117

Exhibits, Petitioner:

1—Agreement Made 4/23/45 Between Rainier Brewing Company and Century Brewing Association 605

2—Agreement Made 7/1/35 Between Rainier Brewing Company and Seattle Brewing and Malting Company Successor to Century Brewing Association 629

3—Agreement Made 7/18/35 Between Rainier Brewing Company and Seattle Brewing and Malting Company 632

4—Indenture Made 7/18/35 Between Rainier Brewing Company and Seattle Brewing and Malting Company 645

5—Indenture Made 7/19/45 Between Seattle Brewing and Malting Company and Rainier Brewing Company 649

6—Agreement Made 7/19/35 Between Seattle Brewing and Malting Company and Rainier Brewing Company 656

7—Agreement made 3/17/35 Between Rainier Brewing Company and Seattle Brewing and Malting Company 686

8—Letter Dated 7/1/40 to Rainier Brewing Company from Seattle Brewing and Malting Company, President E. Sick 695

INDEX PAGE

Exhibits, Petitioner—(Continued):

9—Mortgage Made 7/19/35 by Seattle Brewing and Malting Company, as Mortgagor to Rainier Brewing Company 699

10—Letter dated 4/11/42 to Joseph Goldie, President of Rainier Brewing Company from Seattle Brewing and Malting Company, President Emil G. Sick 703

11—Letter Dated 4/13/42 to Seattle Brewing and Malting Company from Rainier Brewing Company 705

12—Letter Dated 11/25/42 to Rainier Brewing Company from Seattle Brewing and Malting Company, Letter Dated 11/25/42 to Seattle Brewing and Malting Company from Rainier Brewing Company, Letter Dated 11/25/42 to Seattle First National Bank from Rainier Brewing Company 707

13 789

14 790

15 791

16 793

17 794

INDEX

PAGE

Exhibits, Petitioner—(Continued):

18 795

19 796

21 798

20 798

22 799

23 800

24 801

25 802

26 803

27 804

28 805

29 806

30 807

31—Article Regarding Local Option in State of Georgia 721

32—Letter Dated 4/10/35 to Louis Hemrich, President of Rainier Brewing Company from Emil G. Sick, President, Seattle Brewing and Malting Company 732

33—Articles of Incorporation of Rainier Brewing Company 735

34 808

INDEX PAGE

Exhibits, Petitioner—(Continued):

35 815

36 820

37 825

38—Notice of Special Meeting of Board of Directors 740

39 826

40 827

41—Memorandum Re Trade Name "Rainier" 744

Exhibits, Respondent:

A 829

B 764

D 841

E 842

F 768

G 844

H 777

I 849

J 850

K 851

L 870

M 876

INDEX PAGE

Exhibits, Respondent—(Continued):

N 884
O 892
P 908
Q 928
R 947
S 957
T 967
U 980
V 995
W 1026
X 1052
Y 1079
Z 1126
AA 1174
BB 1222
CC 1242
DD 1268

Witnesses, Petitioner:

Forbes, John F.
—direct 352
—cross 387
—redirect 416

INDEX PAGE

Witnesses, Petitioner—(Continued):

Goldie, Joseph

—direct 452
—cross 455
—redirect 460
—recalled 580

Humphrey, William F.

—direct 418
—cross 423
—redirect 433

Samet, Rudolph

—direct 181, 186, 435
—cross 182
—redirect 188, 448

Weber, Cornelius G.

—direct 191
—cross 249
—redirect 346

Witnesses, Respondent:

Clack, James M.

—direct 521
—cross 534
—redirect 565

APPEARANCES:

For Taxpayer:

A. CALDER MACKEY, ESQ.,

ARTHUR McGREGOR, ESQ.,

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ADAM Y. BENNION, ESQ.,

SCOTT H. DUNHAM, ESQ.,

F. SANFORD SMITH, ESQ.

For Commissioner:

B. H. NEBLETT, ESQ. [1*]

* Page numbering appearing at top of page of original certified Transcript of Record.

Docket No. 4895

RAINIER BREWING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1944

May 12—Petition received and filed. Taxpayer notified. Fee paid.

May 13—Copy of petition served on General Counsel.

June 9—Answer filed by General Counsel.

June 9—Request for hearing in San Francisco, California, filed by General Counsel.

June 15—Notice issued placing proceeding on San Francisco, Calif., calendar. Service of answer and request made.

1945

Feb. 10—Hearing set April 23, 1945, in San Francisco, California.

Mar. 21—Hearing date changed to 7/9/45 in San Francisco, California.

June 16—Motion to amend petition, amendment to petition lodged, filed by taxpayer, 6/19/45 Granted.

June 19—Copy of motion and amendment served on General Counsel.

July 19—Hearing had before Judge Harron on merits. Three stipulation of facts and answer to amended petition, filed and served. Petitioner's original brief due 9/24/45. Comm'rs brief 11/8/45. Petitioner's reply 12/10/45.

Aug. 13—Transcript of hearing 7/19/45 filed.

Aug. 13—Transcript of hearing 7/20/45 filed.

Aug. 13—Transcript of hearing 7/21/45 filed.

Sept. 20—Motion for extension of 30 days to file brief, filed by taxpayer. Granted.

Oct. 22—Brief filed by taxpayer. 10/23/45 Copy served.

Nov. 28—Motion for extension to 1/23/46 to file brief, filed by General Counsel. 11/29/45 Granted.

Dec. 31—Motion to file the attached brief as amici curiae, filed by H. B. Jones, and A. R. Kehoe. 1/14/46 Granted.

1946

Jan. 14—Brief of amici curiae filed by H. B. Jones and A. R. Kehoe.

Jan. 23—Motion for extension to 2/23/46 to file brief, filed by General Counsel. 1/24/46 Granted.

Feb. 25—Brief filed by General Counsel. Served 2/26/46.

Mar. 25—Motion for extension to 4/26/46 to file reply brief filed by taxpayer. 3/26/46 Granted.

1946

Apr. 29—Motion for leave to file the attached reply brief, filed by taxpayer. 4/29/46 Granted.

Apr. 29—Reply brief filed by taxpayer. 5/2/46 Served.

June 18—Findings of fact and opinion rendered, Judge Harron. Decision will be entered under Rule 50. Copy served 6/19/46.

June 24—Notice of appearance of Adam Y. Bennion, Scott H. Dunham, and F. Sanford Smith as counsel filed. (3)

July 26—Respondent's computation for entry of decision filed.

July 29—Hearing set 9/11/46 on settlement. Washington, D. C.

Aug. 2—Hearing date changed to 8/14/46.

Aug. 7—Consent to respondent's computation filed.

Aug. 12—Decision entered. Judge Harron. Div. 13.

Nov. 5—Petition for review by U. S. Circuit Court of Appeal, 9th Circuit, filed by General Counsel.

Nov. 14—Proof of service of notice of filing petition for review filed by G. C. on taxpayer.

Nov. 18—Proof of service of notice of filing petition for review filed by General Counsel on A. Calder Mackay, Esq.

Dec. 6—Certified copy of order from the 9th Circuit extending time to 2/15/47 to prepare and transmit the record, filed.

1947

Jan. 21—Statement of points filed with statement of service thereon.

Jan. 21—Designation of portions of record to be printed filed with statement of service thereon.

Jan. 21—Designation of contents of record filed with statement of service thereon. [2]

The Tax Court of the United States

Docket No. 4895

RAINIER BREWING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (symbols IRA:90-D LB) dated March 9, 1944, and as a basis of its proceeding alleges as follows:

I.

The petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of business in the City and County of San

Francisco, California. The returns for the periods here involved were filed with the Collector of Internal Revenue for the First District of California, at San Francisco, California.

II.

The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 9, 1944.

III.

The taxes in controversy are income and declared value excess-profits taxes for the calendar year 1940 in the respective amounts of $235,321.78 and $18,617.60, and excess-profits taxes for the calendar years 1940 and 1941 in the respective amounts of $285,948.74 and $26,119.92. [3]

IV.

The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that promissory notes in the principal amount of $1,000,000.00 received by petitioner during the calendar year 1940 constituted ordinary income, and in failing to determine that said notes constituted the proceeds from the sale in the year 1940 of petitioner's trade names, brands and good will in the State of Washington and the Territory of Alaska.

(b) The Commissioner erred in failing to de-

termine that the said trade names, brands and good will sold by petitioner in 1940 had a basis equal to or in excess of the value of the said notes received in exchange therefor and that there was no taxable gain derived by the petitioner from said sale.

(c) The Commissioner erred in treating the said notes as income or gain subject to tax under the Internal Revenue Code, inasmuch as the income or gain, if any, reflected by said notes was attributable to and had accrued during the period prior to March 1, 1913, and it was not the intent or purpose of Congress to tax the realization of such income or gain.

(d) In the alternative and if it be held that the said notes are taxable as ordinary income, the Commissioner erred in failing to allow petitioner a deduction for the year 1940 of at least the same amount by reason of the exhaustion in said year of the economic usefulness to petitioner of its trade names, trade brands and labels of "Rainier" and "Tacoma" within the State of Washington and the Territory of Alaska.

(e) The Commissioner erred in failing to determine that the major part of the amount of said notes constituted abnormal income attributable to years prior to 1940 within the meaning of section 721 of the Internal [4] Revenue Code, and consequently he erred in determining a deficiency in excess-profits tax for the year 1940.

(f) The Commissioner erred in reducing petitioner's excess-profits credit for the years 1940 and

1941 by deducting from base period net income for the calendar year 1938 the sum of $23,677.52.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as following:

(a) Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of business in the City and County of San Francisco, California. For many years, i.e., since 1893 (except during the period of prohibition), petitioner and its predecessors have been engaged in the business of manufacturing and marketing beer, ale and other alcoholic malt beverages, which products have been sold and distributed principally under the trade names and brands of "Rainier" and "Tacoma".

(b) Seattle Brewing & Malting Company, a Washington corporation, was organized in the year 1893. It established its principal office and place of business in the City of Seattle, State of Washington, and built a brewery in Georgetown, Seattle, where it manufactured and sold beer, ale and other alcoholic malt beverages under the "Rainier" label.

(c) In the year 1899 the said predecessor corporation (Seattle Brewing & Malting Company) registered the trade name "Rainier" in the United States Patent Office, and further registrations of said trade name were obtained in the years 1907, 1914 and 1915. The trade name "Rainier" was

also duly registered in the State of Washington. Said registrations have been continued in full force and effect to the present time. In the year 1903 [5] said Seattle Brewing & Malting Company caused a new corporation to be organized under the laws of the State of West Virginia, under the name of Seattle Brewing and Malting Co., which acquired all the assets of the predecessor corporation. In the same year a corporation was organized under the laws of the State of Washington, known as Rainier Brewing Company, in order further to protect the name "Rainier".

(d) Said Seattle Brewing & Malting Company and its immediate successor, Seattle Brewing and Malting Co., manufactured, at the brewery in Georgetown, Seattle, beer, ale and other alcoholic malt beverages under the trade name "Rainier", using such labels as "Rainier Beer", "Rainier Pale Beer", and "Rainier Bock Beer", during the period from 1893 until the year 1915, when the State of Washington enacted a law prohibiting the manufacture and sale of alcoholic malt beverages in that State. During the period of such operations the companies' products were sold and distributed principally in the State of Washington; a market was also developed for such products in Oregon, California, and other Pacific slope states and the Territory of Alaska. In the year 1915 Seattle Brewing and Malting Co. acquired a site and built the Rainier Brewery in San Francisco, where beer, ale and other alcoholic malt beverages were manufactured and marketed under the said "Rainier"

trade names and trade labels until national prohibition went into effect in the year 1920. For several years thereafter near-beer and other non-alcoholic malt beverages were manufactured and distributed by said last-mentioned corporation, under labels bearing the trade mark "Rainier".

(e) In the year 1925 a reorganization of Seattle Brewing and Malting Co. (the West Virginia corporation) and Rainier Brewing Company (the Washington corporation) was effected whereby said corporations transferred to Pacific Products, Inc., a California corporation, organized in 1925 for that purpose, the brewery plant and property in San Francisco, and also the brewery plant and property in Georgetown, Seattle, Washington, together with all the business, good will, trade names, trade marks, and labels owned and used by Seattle Brewing and Malting Co. and Rainier Brewing Company (the Washington corporation). Thereafter, and until September, 1932, Pacific Products, Inc., continued to manufacture and distribute, at the San Francisco plant, non-alcoholic malt beverages and carbonated beverages, using labels bearing the trade mark "Rainier", such as "Rainier Lager", "Rainier Old German Lager", "Rainier Malt Tonic", "Rainier Ginger Ale", and "Rainier Lime Rickey". In the year 1927, Pacific Products, Inc., acquired the business of the Tacoma Brewing Company in San Francisco, including the trade name, trade mark, and brand of "Tacoma", and thereafter marketed some of its products under the "Tacoma" label.

(f) In the year 1932, when it was anticipated that the prohibition law would be repealed and the manufacture and sale of real beer would again be legalized, a new corporation, with the name of Rainier Brewing Company, Inc., was organized under the laws of the State of California. Said corporation acquired the brewery plants and properties in San Francisco, California, and Georgetown, Seattle, Washington, formerly operated by Seattle Brewing and Malting Co., Rainier Brewing Company, and Pacific Products, Inc., together with the good will, business, trade names, trade marks, brands and labels owned and used by those companies. When repeal of prohibition became effective in the year 1933 said Rainier Brewing Company, Inc., commenced the manufacture, sale and distribution of beer, ale and other alcoholic malt beverages, principally under the "Rainier" trade names and labels owned by it, and to a lesser degree under the trade name and label of "Tacoma". Said corporation also qualified to do business in a number of states, including [7] Oregon and Washington, and in the Territory of Alaska. It established an office and distributing plant at the site of the original brewery in Georgetown, Seattle, Washington, from which beer, ale and other alcoholic malt beverages were sold and distributed in the State of Washington and the Territory of Alaska.

(g) On March 1, 1913, the principal sales territory for said products was the State of Washington, and the fair market value on that date of the sole and exclusive right to manufacture and

market beer, ale and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade name, brand and label of "Rainier" was, as petitioner is informed and believes, at least the sum of $1,000,000.00.

(h) Under date of April 23, 1935, petitioner's immediate predecessor, Rainier Brewing Company, Inc. (of which petitioner is successor through a statutory merger or consolidation), entered into a written contract with Century Brewing Association, a Washington corporation hereinafter known as Century, whereby the latter was granted the exclusive right and license to manufacture and market within the State of Washington and the Territory of Alaska beer, ale and other alcoholic malt beverages under the trade names, trade marks, and labels of "Rainier" and "Tacoma", in consideration of the payment of royalties at the rate of 75c per barrel for all such products sold, up to 125,000 barrels, with a minimum royalty of $75,000.00 per annum, and 80c per barrel for every barrel of product sold under said trade names and brands in excess of 125,000 barrels per annum; such royalties to be payable quarterly on January 1, April 1, July 1, and October 1 of each year.

(i) Pursuant to the terms of said contract, Rainier sold to Century its brewery plant located at Seattle, Washintgon, together with the [8] beer on hand and personal property situated at said brewery, and Rainier withdrew from the sale and distribution of its products in the State of Washington and the Territory of Alaska.

(j) During the five years following the execution of said contract, Century manufactured and marketed in the State of Washington and the Territory of Alaska beer, ale and other alcoholic malt beverages under the trade name and brand of "Rainier". Century did not market any products under the trade name and brand of "Tacoma". During said five years, Century paid to Rainier Brewing Company, Inc. and to petitioner the royalties as called for in said contract, and the amount of said royalties was included in the gross income for Federal income tax purposes of Rainier and petitioner.

(k) During the year 1940 Century exercised the option granted to it by said contract and delivered to petitioner promissory notes in the principal amount of $1,000,000.00, as a lump sum payment for the exclusive and perpetual right and license thereafter to manufacture and market beer, ale and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the Trade names and brands of "Rainier" and "Tacoma".

(l) As a consequence of the exercise of said option by Century, petitioner, in the year 1940, disposed finally and definitively of its trade names, brands and good will in the State of Washington and the Territory of Alaska, and of its sole and exclusive right to manufacture and market beer, ale and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade names, brands and labels of "Rainier" and "Tacoma". Petitioner realized no

taxable gain or income from said transaction, by virtue of the fact that the right thus sold or otherwise disposed of had, as petitioner is informed and believes, a basis equal to or in excess [9] of the fair market value of the notes received in exchange therefor.

(m) During the calendar year 1938 petitioner abandoned certain neon signs purchased by it in 1935. The unrecovered cost of such neon signs at the time of abandonment was $23,386.92, which sum was deducted by petitioner on its Federal income tax return for 1938 as a loss due to abandonment. The said deduction was allowed by the Commissioner as claimed on the return. In computing excess-profits net income for the year 1938 the Commissioner erroneously and illegally refused to treat the said loss as a loss due to abandonment and determined that said loss represented ordinary and necessary business expense for the year 1938.

Wherefore, the petitioner prays that this Court may hear the proceeding and redetermine the aforesaid deficiencies in accordance with the rights of the petitioner in the premises and grant such other and further relief, including refunds, as to it may seem just and proper as a result of such redetermination.

Dated: April 29, 1944.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
Counsel for Petitioner. [10]

State of California,
City and County of San Francisco—ss.

F. S. Smith, being duly sworn, deposes and says: That he is Secretary of Rainier Brewing Company, the petitioner named in the foregoing petition; that he is duly authorized to verify said petition; that he has read the said petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters he believes it to be true.

F. S. SMITH.

Subscribed and sworn to before me this 4th day of May, 1944.

(Notarial Seal) JAMES F. McCUE,

Notary Public in and for said City and County of San Francisco, State of California. [11]

EXHIBIT A

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco 5, California

Mar. 9, 1944.

Office of Internal Revenue Agent in Charge San Francisco Division
IRA:90-D
LB

Rainier Brewing Company
1550 Bryant Street
San Francisco, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1940 discloses a deficiency of $235,-321.78 and an overassessment of $5,791.97 for the taxable year ended December 31, 1941; that the determination of your declared value excess-profits tax liability for the taxable year ended December 31, 1940, discloses a deficiency of $18,617.60 and that the determination of your excess profits tax liability for the taxable years ended December 31, 1940, and December 31, 1941, disclose a deficiency of $312,068.66 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal

holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectively,

JOSEPH D. NUNAN, JR.,
Commissioner,

By /s/ F. M. HARLESS,
Internal Revenue Agent
in Charge.

Enclosures:
Statement
Form of waiver. [12]

STATEMENT

San Francisco
IRA :90-D
LB

Rainier Brewing Company,
1550 Bryant Street,
San Francisco, California

Tax Liability for the Taxable Years Ended
December 31, 1940 and December 31, 1941

Year	Liability	Assessed	Overassessment	Deficiency
Income Tax				
1940	$387,232.14	$151,910.36		$235,321.78
1941	217,686.12	223,478.09	$5,791.97	
Totals	$604,918.26	$375,388.45	$5,791.97	$235,321.78
Declared Value Excess-Profits Tax				
1940	$ 18,617.60	—		$ 18,617.60
Excess Profits Tax				
1940	$285,948.74	—		$285,948.74
1941	27,413.19	$ 1,293.27		26,119.92
Totals	$313,361.93	$ 1,293.27		$312,068.66

In making this determination of your tax liability, careful consideration has been given to your protest of November 15, 1943 and to the statements made at the conference held on December 16, 1943 and subsequent dates.

The overassessment of income tax shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322, Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district a claim for refund on form 843, a copy of which is enclosed, the basis of which may be as set forth herein.

A copy of this letter and statement has been mailed to your representative, Mr. Scott H. Dunham, Crocker Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office. [13]

Adjustments to Net Income

Year: 1940

Net income as disclosed by return	$ 633,179.76
Unallowable deductions and additional income:	
(a) Income under royalty contract	1,000,000.00
Total	$1,633,179.76
Nontaxable income and additional deductions:	
(b) Capital stock tax	875.00
Net income adjusted	$1,632,304.76

Explanation of Adjustments

(a) In the taxable year you received a payment of $1,000,000.00 from the Century Brewing Association under a contract executed in 1935 whereby you granted to Century Brewing Company a license to use trade names, held by you, in connection with the marketing of beer, ale, and other alcoholic liquors made from malt, in the State of Washington and the Territory of Alaska. No income from such payment was reported in your return for 1940. You contend that the receipt of $1,000,000.00 represented the proceeds of a sale by you of good will and an interest in the trade names; that such good will and trade names have a basis, represented by the market value at March 1, 1913, in excess of the proceeds; that hence no deductible loss was allowable and no taxable gain was reportable. It is held that the contract executed in 1935 did not affect a sale of trade names or good will; that the payment of $1,000,000.00 received by you in 1940 was ordinary income taxable in full without any offset for the claimed basis.

It is further held that since the transaction did not constitute a sale, the income realized in 1940 may not be excluded from excess profits net income under section 721 of the Internal Revenue Code.

(b) The allowable deduction for capital stock tax accrued is revised as follows:

Declared value of capital stock at December 31, 1940 as shown in return filed for year ended June 30, 1941		$9,500,000.00
Capital stock tax accrued July 1, 1940 at rate of $1.25 per $1,000.00 of declared value		11,875.00
As deducted in return		$ 11,000.00
Increased allowance		$ 875.00

Computation of Declared Value Excess-Profits Tax
Year: 1940

Net income for declared value excess-profits tax computation		$1,632,304.76
Less:		
10 percent of $13,500,000.00, value of capital stock as declared in your capital stock tax return for the year ended June 30, 1940	$1,350,000.00	
Dividends received credit (85 percent of $258.75)	219.94	1,350,219.94
Balance subject to declared value excess-profits tax		$ 282,084.82
5 per cent of declared value of capital stock		675,000.00
Balance		0
Amount taxable at 6 percent $282,084.82		$ 16,925.09
Declared value excess-profits defense tax (10 percent of $16,925.09)		1,692.51
Total declared value excess-profits and declared value excess-profits defense taxes assessable		$ 18,617.60
Declared value excess-profits tax assessed:		
Original, April 1941 account No. 410350—First California District		None
Deficiency of declared value excess-profits tax		$ 18,617.60

Computation of Income Tax

Year: 1940

Net income for declared value excess-profits tax computation	$1,632,304.76
Less:	
Declared value excess-profits tax	18,617.60
Adjusted net income	$1,613,687.16
Less:	
Dividends received credit	219.94
Normal tax net income	$1,613,467.22
Income tax (22.1 percent of $1,613,467.22)	$ 356,576.26
Income defense tax (1.9 percent of $1,613,467.22, normal tax net income)	30,655.88
Total income and income defense taxes assessable	$ 387,232.14
Income tax assessed:	
Original, April 1941 account No. 410350—First California District	151,910.36
Deficiency of income tax	$ 235,321.78

Adjustments to Excess Profits Net Income as Computed Under the Income Credit Method

Year: 1940

Excess profits net income as disclosed by return		$ 480,517.12
Additions:		
(a) Net addition to normal-tax net income as shown herein		999,125.00
Total		$1,479,642.12
Deductions:		
(b) Declared value excess-profits tax	$ 18,617.60	
(c) Additional income tax	235,321.78	253,939.38
Excess profits net income as revised		$1,225,702.74

Explanation of Adjustments

(a) The net addition to normal-tax net income is explained in the foregoing.

(b)	Declared value excess-profits tax as revised herein	$ 18,617.60
	As shown in return	0
	Increased allowance	$ 18,617.60
(c)	Income tax as revised herein	$ 387,232.14
	As shown in return	151,910.36
	Increased allowance	$ 235,321.78

Adjustments of Excess Profits Credit Based on Income

Year: 1940

	As disclosed by return	Additions (Deductions)	Corrected
Base Period Net Income			
Excess profits net income			
Year ended December 31, 1936	$(15,221.28)		$(15,221.28)
Year ended December 31, 1937	(12,871.12)		(12,871.12)
Year ended December 31, 1938	166,589.74	(a)$(23,677.52)	142,912.22
Year ended December 31, 1939	629,204.72		629,204.72
Totals	$767,702.06		$744,024.54
Net aggregate	782,923.34		759,345.82
Average base period net income—General average	195,730.83		189,811.45

Base Period Net Income—	
Increased Earnings in Last Half	
Net aggregate, last half of period	$ 772,116.94
Net aggregate, first half of period	28,092.40
Excess, last half over first half	$ 800,209.34
50 percent of such excess	$ 400,104.67
Add: Net aggregate for last half	772,116.94
Total	$1,172,221.61
Average Base Period Net Income	
Based on above	$ 586,110.80
Amount limited to excess profits net income for year ended December 31, 1939	$ 629,204.72
Excess Profits Credit—95 percent of average base period net income	$ 556,805.26
Excess Profits Credit—Based on Income	$ 556,805.26

Explanation of Adjustment

(a) Base period net income for the year ended December 31, 1938 is decreased by $23,677.52, as shown below:

1. To restore deduction for obsolescence eliminated on the return as abnormal income	$23,386.92
2. Additional deduction for State franchise tax	290.60
Net additional deductions	$23,677.52

1. No elemination of abnormal deduction for obsolescence is allowable for charges for Neon beer signs. Such items represent normal advertising expense.

2. Further reduction in 1938 income is made for additional franchise taxes applicable to such year, paid in 1940.

Computation of Excess Profits Tax

Year: 1940

Excess profits net income		$1,225,702.74
Less:		
Specific exemption	$ 5,000.00	
Excess profits credit	556,805.26	561,805.26
Adjusted excess-profits net income		$ 663,897.48
Tax on $ 20,000.00 at 25 percent		$ 5,000.00
Tax on 20,000.00 at 30 percent		9,000.00
Tax on 50,000.00 at 35 percent		17,500.00
Tax on 150,000.00 at 40 percent		60,000.00
Tax on 250,000.00 at 45 percent		112,500.00
Tax on 163,897.48 at 50 percent		81,948.74
Total excess profits tax		$ 285,948.74
Total excess profits tax assessable		$ 285,948.74
Excess profits tax assessed:		
Original, Account No. 801759—First California District		—
Deficiency of excess profits tax		$ 285,948.74

Adjustments to Net Income

Year: 1941

Net income as disclosed by return		$ 723,184.85
Unallowable deductions and additional income:		
(a) Taxes, real estate	$2,075.36	
(b) Beer Tax	5,377.50	
(c) Refund California Unemployment Insurance	1,142.04	
(d) State franchise tax	35.00	8,629.90
Total		$ 731,814.75
Nontaxable income and additional deductions:		
(e) Capital stock tax		1,193.75
Net income adjusted		$ 730,621.00

Explanation of Adjustments

(a) Real property taxes in the amount of $2,075.36 were paid in the taxable year on property purchased in July 1941. Such taxes were a lien on the property at time of purchase and constitute part of the purchase price. No deductions therefor are allowable.

(b) In 1939 additional beer taxes in the amount of $10,615.00 were asserted against you by the Federal Government. Such additional taxes were claimed and allowed to you as a deduction on your return for 1939. The liability for such taxes was later compromised and in 1941 a settlement payment was made in the amount of $5,237.50 leaving a balance of $5,377.50 unpaid of the amount previously accrued and deducted. It is held that the balance unpaid after the final settlement in 1941 represents income taxable in such year.

(c) The deduction for California Unemployment taxes accrued and paid in the year 1941 is reduced in the amount of $1,142.04 determined to be an overpayment and refunded to you in 1942.

(d) Due to the reduction in net income for the year 1940 for the overstatement of capital stock taxes in the amount of $875.00 for such year, the allowable deduction for California State franchise tax accrued in 1941 on the basis of net income for 1940, is reduced in the amount of $35.00, being the applicable rate of 4 percent for franchise tax applied against $875.00. No additional deduction is

allowed for franchise tax applicable to the increase of $1,000,000.00 in reportable net income for the year 1940, since you deny that any franchise tax liability was incurred in connection with such alleged income.

(e) The allowable deduction for capital stock tax accrued in 1941 is revised as follows:

Declared value of capital stock on December 31, 1941, as shown in return filed for the year ended June 30, 1942		$12,000,000.00
Capital stock tax accrued July 1, 1941 at rate of $1.25 per $1,000.00 of declared value		$ 15,000.00
Amount deducted in your return		13,806.25
Additional deduction allowable		$ 1,193.75

Computation of Declared Value Excess-Profits Tax

Year: 1941

Net income for declared value excess-profits tax computation		$ 730,621.00
Less:		
10 percent of $9,500,000.00, value of capital stock as declared in your capital stock tax return for the year ended June 30, 1941	$950,000.00	
Dividends received credit	188.06	950,188.06
Balance subject to declared value excess-profits tax		None
Total declared value excess-profits tax assessable		None
Declared value excess-profits tax assessed:		
Original, Account No. 411100—First California District		None

Computation of Income Tax

Year: 1941

Net income for declared value excess-profits tax computation		$730,621.00
Less: Declared value excess-profits tax		None
Net income for capital stock tax purposes		$730,621.00
Less: Excess-profits tax as revised herein		27,413.19
Adjusted net income		$703,207.81
Less: Dividends received credit		188.06
Normal-tax net income		$703,019.75
Normal Tax Computation		
Normal-tax net income	$703,019.75	
Tax at 24 percent on $703,019.75		$168,724.74
Surtax Computation		
Surtax net income	$703,019.75	
Tax at 6 percent on $ 25,000.00	$ 1,500.00	
Tax at 7 percent on 678,019.75	47,461.38	48,961.38
Total normal tax and surtax		$217,686.12
Total income tax assessable		$217,686.12
Income tax assessed:		
Original, Account No. 411100—First California District		223,478.09
Overassessment of income tax		$ 5,791.97

Adjustments to Excess Profits Net Income as Computed Under the Income Credit Method

Year: 1941

Excess profits net income as disclosed by return	$722,429.75
Additions:	
(a) Net additions to normal tax net income as shown herein	7,436.15
Excess profits net income as revised	$729,865.90

Explanation of Adjustments

(a) The net additions to normal-tax net income are explained in the foregoing.

Adjustments of Excess Profits Credit Based on Income

Year: 1941

	As disclosed by return	Additions (Deductions)	Corrected
Base Period Net Income			
Excess profits net income:			
Year ended December 31, 1936	$(10,867.73)		$(10,867.73)
Year ended December 31, 1937	(8,991.09)		(8,991.09)
Year ended December 31, 1938	188,421.08	(a) $(22,734.95)	164,686.13
Year ended December 31, 1939	749,634.51		749,634.51
Totals	929,064.50		$905,329.55
Average base period net income—General average	$222,266.12		$226,332.39

Base Period Net Income—Increased Earnings in Last Half	
Net aggregate, last half of period	$ 914,230.64
Net aggregate, first half of period	(19,858.82)
Excess, last half over first half	$ 934,179.46
50 percent of such excess	467,089.73
Add: Net aggregate for last half	914,320.64
Total	$1,381,410.37

Average Base Period Net Income Based on above	$ 690,705.18
Amount limited to excess profits net income for year ended December 31, 1939	$ 749,634.51
Excess Profits Credit—95 percent of average base period net income	656,169.92
Excess Profits Credit—Based on Income	$ 656,169.92

Explanation of Adjustments

(a) The base period net income for the year ended December 31, 1938 is reduced by $23,734.95, deduction for obsolescence. No elimination of abnormal deduction for obsolescence is allowable for charges for Neon beer signs. Such items represent normal advertising expense.

Computation of Excess Profits Tax

Year: 1941

Excess profits net income		$729,865.90
Less:		
Specific exemption	$ 5,000.00	
Excess profits credit	656,169.92	661,169.92
Adjusted excess profits net income		$ 68,695.98
Tax on $20,000.00 at 35 percent		$ 7,000.00
Tax on 30,000.00 at 40 percent		12,000.00
Tax on 18,695.98 at 45 percent		8,413.19
Total excess profits tax assessable		$ 27,413.19
Excess profits tax assessed:		
Original, account No. 400549—First California District		1,293.27
Deficiency of excess profits tax		$ 26,119.92

Received and filed May 12, 1944. [23]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

I.

Admits the allegations contained in paragraph I of the petition.

II.

Admits the allegations contained in paragraph II of the petition.

III.

Admits the allegations contained in paragraph III of the petition.

IV

Denies that the determination of tax set forth in the notice of deficiency is based upon errors as alleged in subparagraphs (a) to (f), inclusive, of paragraph IV of the petition.

V.

(a) Admits the allegations contained in subparagraph (a) of paragraph V of the petition.

(b) Admits the allegations contained in subparagraph (b) of paragraph V of the petition.

(c) Admits that in the year 1899 the predecessor corporation (Seattle Brewing & Malting Company) registered the trade name "Rainier" in the United States Patent Office, and further registrations of said trade name were obtained in the years 1907, 1914 and 1915; admits that the trade name "Rainier" was also duly registered in the State of Washington; admits that said registrations have been continued in full force and effect to the present time; admits that in the year 1903 said Seattle Brewing & Malting Company caused a new corporation to be organized under the laws of the State of West Virginia, under the name of Seattle Brewing and Malting Co., which acquired all the assets of the predecessor corporation; denies that in the same year a corporation was organized under the laws of the State of Washington, known as Rainier Brewing Company, in order further to protect the name "Rainier".

(d) Admits the allegations contained in subparagraph (d) of paragraph V of the petition.

(e) Admits that in the year 1925 a reorganization of Seattle Brewing and Malting Co. (the West Virginia corporation) and Rainier Brewing Company (the Washington corporation) was effected whereby said corporations transferred to Pacific Products, Inc., a California corporation, organized in 1925 for that purpose, the brewery plant and property in San Francisco, and also the brewery plant and property [25] in Georgetown, Seattle, Washington, together with all the business, good will, trade names, trade marks, and labels owned

and used by Seattle Brewing and Malting Co. and Rainier Brewing Company (the Washington corporation); admits that thereafter, and until September, 1932, Pacific Products, Inc., continued to manufacture and distribute, at the San Francisco plant, non-alcoholic malt beverages and carbonated beverages, using labels bearing the trade mark "Rainier", such as "Rainier Lager", "Rainier Old German Lager", "Rainier Malt Tonic", "Rainier Ginger Ale", and "Rainier Lime Rickey"; for lack of information denies that in the year 1927, Pacific Products, Inc., acquired the business of the Tacoma Brewing Company in San Francisco, including the trade name, trade mark, and brand of "Tacoma", and thereafter marketed some of its products under the "Tacoma" label.

(f) Admits that in the year 1932 a new corporation was organized under the laws of the State of California; for lack of information denies the remaining allegations contained in subparagraph (f) of paragraph V of the petition.

(g) Denies the allegations contained in subparagraph (g) of paragraph V of the petition.

(h), (i), (j), and (k) Admits the allegations contained in subparagraphs (h), (i), (j), and (k) of paragraph V of the petition.

(l) and (m) Denies the allegations contained in subparagraphs (l) and (m) of paragraph V of the petition. [26]

VI.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ J. P. WENCHEL, TMM
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

TMM/ls 6/3/44

Received and filed June 9, 1944. [27]

[Title of Tax Court and Cause.]

AMENDMENT TO PETITION

The petition in the above entitled cause is hereby amended in the following particulars:

1. By amending paragraph IV(e) to read as follows:

"(e) The Commissioner erred in failing to determine that the face amount of said notes, or, in the alternative, the major portion thereof, constituted abnormal income attributable to years other than the taxable year 1940 within the meaning of section 721 of the

Internal Revenue Code, and consequently he erred in determining a deficiency in excess profits tax for the year 1940."

2. By amending paragraph V(1) by adding at the end thereof a new sentence as follows: [28]

"The property thus sold or otherwise disposed of constituted capital assets which had been held by petitioner for more than 18 months."

/s/ A. CALDER MACKAY,
/s/ ADAM Y. BENNION,
Counsel for Petitioner.

Of Counsel:

/s/ F. SANFORD SMITH,
/s/ CLIFFORD J. MacMILLAN,
/s/ O. J. SONNENBERG,
/s/ SCOTT H. DUNHAM. [29]

State of California,
City and County of San Francisco—ss.

F. S. Smith, being duly sworn, deposes and says: That he is Secretary of Rainier Brewing Company, the petitioner named in the foregoing amendment to petition; that he is duly authorized to verify said amendment to petition; that he has read the said amendment to petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters he believes it to be true.

F. S. SMITH.

Subscribed and sworn to before me this 8th day of June, 1945.

(Notarial Seal) JAMES F. McCUE,

Notary Public in and for said City and County and State.

Lodged June 16, 1945.

[Endorsed]: Filed and motion granted June 19, 1945. [30]

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to the petition filed by the above-named petitioner, and denies as follows:

1. Denies that the Commissioner erred as alleged in paragraph 1 of the amendment to the petition.

2. Denies the allegations contained in paragraph 2 of the amendment to the petition.

/s/ J. P. WENCHEL, BHN
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel,
Bureau of Internal Revenue.

BHN/vg

Filed July 23, 1945. [31]

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

1. The amount received by petitioner in 1940 for the exclusive and perpetual right to use its trade names in a limited territory held not ordinary income, but proceeds from the sale of a capital asset. Seattle Brewing & Malting Co., 6 T. C. 856.

2. The March 1, 1913, value of good will incident to trade names determined.

3. Held, deduction for loss in value of good will occasioned by the National Prohibition Amendment is not provided for by the words "exhaustion" or "obsolescence" as used in the income tax laws and is neither "allowed" nor "allowable" within the meaning of section 113 (b) (1) (B) of the Internal Revenue Code. Clarke v. Haberle Crystal Springs Brewing Co., 280 U. S. 384. Therefore, such loss "allowed" by the Commissioner is limited to the tax benefits realized by the taxpayer.

4. Held, an agreement not to compete executed in 1935 had no ascertainable value in 1940.

A. Calder Mackay, Esq., Adam Y. Bennion, Esq., F. Sanford Smith, Esq., and Scott H. Dunham, C. P. A., for the petitioner.

B. H. Neblett, Esq., for the respondent.

The respondent determined deficiencies in income tax, declared value excess profits tax, and excess profits tax for the years 1940 and 1941 as follows:

	Year	Deficiency
Income tax	1940	$235,321.78
Declared value excess profits tax	1940	18,617.60
Excess profits tax	1940	285,948.74
	1941	26,119.92

Petitioner contests the determination made by the respondent. Petitioner contends that $1,000,000 of promissory notes which it received in the taxable year 1940 did not constitute ordinary income, as respondent has determined. Petitioner contends that it received the notes as the consideration for the sale of its trade names, brands, and trade-marks in the State of Washington and the Territory of Alaska. [32]

There are four questions to be decided in this proceeding. The first question is whether there was a sale of a capital asset. If there was a sale of a capital asset, a second question must be determined, namely, the amount of the gain or loss, which, in turn, requires our determination of the basis of the capital asset as of March 1, 1913. Petitioner contends that no gain was realized because it attributes a March 1, 1913, value to the property involved of more than $1,000,000, the amount of the consideration received in 1940. The third question relates to the adjusted basis of the property which was sold. The fourth question is whether any part of the $1,000,000 which petitioner received in 1940 is allocable to an agreement not to compete which was contained in the contract of April 23, 1935.

The issue with respect to the excess profits tax for the year 1941 in the amount of $26,119.92 has been abandoned by the petitioner, so that the deficiency for 1941 is $26,119.92.

The case is submitted on the pleadings, certain stipulations, and oral and documentary evidence submitted at the hearing.

Findings of Fact

The petitioner is a corporation, organized under the laws of the State of California, with its principal office and place of business in the city and county of San Francisco, California. The income tax returns for the periods here involved were filed with the collector of internal revenue for the first district of California at San Francisco, California.

Petitioner's predecessor in interest, Seattle Brewing & Malting Co. (sometimes hereinafter referred to as Seattle), was incorporated under the laws of the State of Washington in 1893. Its principal place of business was in Seattle, where it built a brewery and manufactured beer, ale, and other alcoholic malt beverages for sale under the trade name and brand of "Rainier."

In 1903 a new corporation by the name of "Seattle Brewing and Malting Co." (also referred to hereinafter as Seattle) was organized under the laws of West Virginia. This corporation acquired all the assets of the Washington corporation, including the trade name "Rainier," and operated the business until the end of 1915 when, because of

statewide prohibition, it stopped the manufacture of beer and ale in the State of Washington and began manufacturing these products at San Francisco, California, through its wholly owned subsidiary, Rainier Brewing Co., a Washington corporation, until national prohibition went into effect in 1920.

In 1925 Seattle and its wholly owned subsidiary, Rainier Brewing Co., were merged through a nontaxable reorganization into a California [33] corporation known as Pacific Products, Inc., which was organized in 1925 for that purpose. This company acquired all the assets of the two former companies, which included the plants in Seattle and San Francisco, together with their assets, business, good will, trade-marks, trade names, and labels. In 1927 Pacific Products, Inc., acquired by purchase the right to use the trade name "Tacoma." Pacific Products, Inc., operated the business until 1932 when, through a nontaxable reorganization, "Rainier Brewing Co., Inc.," a California corporation organized in 1932, acquired all the assets of Pacific Products, Inc. (except certain designated assets not used in the conduct of its manufacturing business) including the trade names "Rainier" and "Tacoma." In 1937 Rainier Brewing Co., Inc., was merged into the Pacific Products, Inc., in a nontaxable reorganization, and Pacific Products, Inc., as the surviving company, changed its name to Rainier Brewing Co., the petitioner herein.

Rainier Brewing Co., Inc., carried on the busi-

ness that had been conducted by its predecessor, and with the repeal of prohibition in 1933 resumed the manufacture and sale of real beer, ale, and other alcoholic malt beverages under the trade name "Rainier." Such products were manufactured at the plant in San Francisco. The plant in Seattle was only used as a warehouse and sales office for distribution of the products in the State of Washington.

In view of the rapid expansion of business following the repeal of prohibition the officers of Rainier Brewing Co., hereinafter referred to as petitioner, in about the year 1935 considered reopening the Seattle plant as a brewery. About that time, however, they were approached by a competing company in the State of Washington, known as the Century Brewing Association (hereinafter referred to as Century), with a view to acquiring the right to use the trade names "Rainier" and "Tacoma" in the manufacture and sale of beer in the State of Washington and the Territory of Alaska and to have the name Seattle Brewing & Malting Co.

The trade name "Rainier" had a well established and recognized value by reason of its use and development and Century was desirous af acquiring the right to use it in connection with the manufacture and sale of its own beer. The trade name "Tacoma" was less used and was not so valuable.

As a result of negotiations a contract was entered into between petitioner and Century on April 23, 1935, under which Century purchased certain prop-

erty and equipment located in Seattle and certain personal property, and secured the right to use the trade names "Rainier" and "Tacoma" in the State of Washington and the Territory of Alaska (hereinafter sometimes referred to as Washington) in [34] consideration of the payment of certain sums to be determined on a production basis or a minimum royalty specified therein.

The contract of April 23, 1935, after reciting the mutual desire of petitioner to sell and Century to purchase petitioner's Seattle plant and certain personal property located in Seattle and the State of Washington, and of Century to secure by royalty contract and of petitioner to grant the right to use the trade names "Rainier" and "Tacoma," within the State of Washington and the Territory of Alaska, and after providing in detail for the sale of the physical properties, continues with the following provisions:

Licensing Agreement

Seventh: Rainier hereby grants to Century the sole and exclusive perpetual right and license to manufacture and market beer, ale and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the tradenames and brands of "Rainier" and "Tacoma" together with the right to use within said State and Territory any and all copyrights, trademarks, labels, or other advertising media adopted or used by Rainier in connection with its beer, ale, or other alcoholic malt beverages.

Eighth: In consideration of said perpetual right and license, Century agrees to pay to Rainier in cash, lawful money of the United States, a royalty amounting to seventy-five cents (75c) per barrel (consisting of 31 gallons) for every barrel of beer, ale, or other alcoholic malt beverages sold or distributed in the State of Washington and the Territory of Alaska under the said trade names or brands of "Rainier" and "Tacoma" up to a total of one hundred twenty-five thousand (125,000) barrels annually, and eighty cents (80c) per barrel for all such products distributed within said territory annually in excess of said amount of one hundred twenty-five thousand (125,000) barrels; provided, however, that the minimum annual amount to be so paid by Century to Rainier shall be the sum of seventy-five thousand dollars ($75,000.00), which said amount is herein termed "minimum annual royalty." Said payments shall be made in lawful money of the United States as follows:

* * * * * * *

Century further agrees that annually on the 1st day of August of each year, commencing with the 1st day of August, 1936, it will deliver to Rainier a statement prepared by Price, Waterhouse & Co., or other Certified Public Accountants acceptable to Rainier, showing the sales of beer, ale and other alcoholic malt beverages under the trade names or brands of "Rainier" and "Tacoma" for the contract year commencing July 1st and ending June

30th immediately preceeding the date of such statement.

Rainier shall have the right, at its own cost and expense, to examine the books, records and accounts of Century for the purpose of verifying any such statement so submitted to determine the accuracy thereof.

Ninth: Rainier agrees that during the period of time this agreement remains in force, it will not manufacture, sell or distribute, within the territory herein described, directly or through or by any subsidiary company or instrumentality wholly owned or substantially controlled by it, beer, ale, or other alcoholic malt beverages, or directly or indirectly enter into competition with Century in said territory. It is understood and agreed, however, that Rainier shall have the sole and exclusive right to manufacture, sell, and distribute non-alcoholic beverages [35] within said territory under said trade names or brands of "Rainier" and "Tacoma" and any and all other trade names or brands that it owns and desires to use.

Rainier agrees that during the period of time this agreement remains in force it will maintain in full force and effect Federal registration of said trade names or brands, "Rainier" and "Tacoma," and will likewise maintain in full force and effect the present registration of said trade names or brands within the State of Washington and Territory of Alaska. Should Rainier fail to so maintain its rights under said trade names or brands, then and

in that event Century shall have the right to pay any and all amounts necessary to so maintain said trade names or brands for and in the name of Rainier, and shall be entitled to deduct any and all amounts so paid from the royalties then due or thereafter becoming due under this agreement.

Tenth: Century agrees that any and all beer, ale, or other alcoholic malt beverages manufactured by it pursuant to this agreement and marketed under said trade names and brands of "Rainier" and "Tacoma" shall at all times be of a quality at least equal to the quality of similar products then manufactured and marketed under said trade names and brands by Rainier; and shall be manufactured under the same formulae used in the manufacture of similar products by Rainier, which formulae Rainier shall make available to Century.

Eleventh: It is understood and agreed by and between the parties hereto that should Century at any time be prevented from manufacturing, selling, and distributing beer, ale, or other alcoholic malt beverages due to strikes, boycotts, fires, earthquakes or acts of God, for periods of time in excess of three (3) months, and as a result thereof Century shall fail to earn a sufficient amount from the operation of its entire business to enable it to pay the royalty next due and payable under this agreement, then and in that event, the time of payment of such royalty shall be deferred for a period of time equal and equivalent to the period during which such cause shall continue, but in no event

beyond a date upon which Century has available sufficient funds to pay royalty payments that have accrued; provided, however, that during any such period when royalty payments shall be so deferred, Century shall apply all of its monthly net income derived from the operation of its entire business toward the payment of any royalties so due.

Should the citizens residing in any portion of the territory covered by this agreement elect to adopt local prohibition laws prohibiting the manufacture, sale, and distribution of beer, ale, or other alcoholic malt beverages in such community, and should Century, due to such laws, be unable to sell and distribute within the territory described in this agreement, beer, ale, and other alcoholic malt beverages manufactured under the trade-names and brands of "Rainier" and "Tacoma" in a quantity at least equal to fifty-two thousand (52,000) barrels annually, then and in that event, the minimum royalty payable hereunder shall be reduced during the continuance of the operation of such laws by the percentage that the sales of such products under such trade names and brands of "Rainier" and "Tacoma" sold within that particular community bear to the total sales of such products by Century under such brands within the entire territory covered hereby, which percentage shall be based upon the average sales of such products theretofore made hereunder.

It is further understood and agreed by and between the parties hereto that should Century at any

time be prevented from manufacturing, selling and distributing beer, ale, or other alcoholic malt beverages under the brands and trade names of "Rainier" and "Tacoma," in a quantity at least equal to fifty-two thousand (52,000) barrels annually, due to governmental action, war regulation, [36] or general prohibitory laws adopted by the United States of America or the State of Washington, then and in that event Century shall have the option of terminating this agreement or submitting to arbitration, in the manner hereinafter provided, the question of adjusting the minimum royalties payable hereunder during the continuance of such restriction upon the operation of its business. In the event that Century elects to submit the matter to arbitration, it agrees to abide by any decision rendered by the arbiters, and to pay the minimum royalties so fixed, in the manner and at the times herein provided. Rainier agrees, in the event of such arbitration, to accept the royalties so fixed in satisfaction of the obligation of Century for such period.

Twelfth: Century agrees that upon acquiring title to the real property herein agreed to be sold to it by Rainier, it will, in addition to executing the mortgage provided in paragraph Third hereof, execute and deliver to Rainier such document or documents as Rainier shall deem necessary to cause said real property to stand as security for the prompt and faithful compliance by Century of all of its obligations under this agreement, to the end that should Century default in the performance of its obligations under this agreement and should

Rainier elect to terminate this agreement, then and in that event, title to said real property shall pass to Rainier, free and clear of all liens and encumbrances, as and for liquidated damages due to such default.

Century further agrees that should it sell said property, it will, under written agreements satisfactory to Rainier, impound the proceeds received from such sale to the extent of two hundred fifty thousand dollars ($250,000.00), or such sums as shall be realized on said sale, which said impounded funds shall thereafter stand as security for the prompt and faithful compliance by Century of all of its obligations under this agreement, and in the event of default, be transferred and delivered to Rainier as and for liquidated damages.

It is understood and agreed by and between the parties hereto that in the event of the default of Century hereunder, the termination of this agreement by Rainier, and the transfer or delivery to Rainier of said real property, or such impounded proceeds as liquidated damages, Rainier shall, in addition thereto, be entitled to recover any and all royalties due and payable under this agreement at the time of the termination thereof, which said amounts Century agrees to pay upon demand.

Thirteenth: It is understood and agreed by and between the parties hereto that at any time after this agreement has been in force for five (5) years, Century shall have the right and option of electing to terminate all royalties thereafter payable here-

under by notifying Rainier of its election so to do, and by executing and delivering to Rainier the promissory notes of Century aggregating in principal amount the sum of one million dollars ($1,000,000.00) dated as of the date of the exercise of such option, bearing interest from date at the rate of five per cent (5%) per annum, which said promissory notes shall be divided into five (5) equal maturities and shall be payable respectively on or before one (1), two (2), three (3), four (4), and five (5) years after the dates thereof.

Paragraphs fourteenth to twenty-fifth were headed "Miscellaneous Provisions." In paragraph fourteenth Century agreed to purchase from petitioner at prevailing market prices all malt required in the manufacture of beer, ale, and other alcoholic malt beverages under the trade names and brands of "Rainier" and "Tacoma." In paragraph fifteenth Century agreed to use its best efforts to increase the sales of alcoholic malt beverages within its territory and to expend in [37] advertising amounts equal to those expended in advertising all other beverages manufactured and sold by it under other brands in Washington. In paragraph seventeenth petitioner agreed to cause the old "Seattle Brewing and Malting Company," the West Virginia corporation, to change its name to the end that Century might adopt the name "Seattle Brewing & Malting Company." Paragraph twenty-second provided that if Century should fail to fully and promptly carry out the terms and provisions of the agreement or to make payments according thereto after proper

notice by petitioner, such failure should be considered an event of default and petitioner should cancel the agreement by written notice to Century, in which event all the rights of Century should terminate and liquidated damages as specified in paragraph twelfth would accrue to petitioner. It was further provided in paragraph twenty-fourth that the agreement should be binding upon and inure to the benefit of the parties and their respective successors and assigns, provided, however, that no rights of Century should be assigned by it without the written consent of petitioner first had and obtained.

The contract was carried into execution. In pursuance of paragraph seventeenth of the agreement Century changed its name from Century Brewing Association to "Seattle Brewing & Malting Company" (sometimes hereinafter referred to as either Century or the purchaser). Petitioner withdrew from the sale and distribution of its alcoholic malt products in Washington. The Seattle plant was deeded by petitioner to Century and Century conveyed the Seattle plant to a bank as trustee and executed its trust indenture with petitioner as beneficiary, all in accordance with the terms of the agreement. From time to time thereafter various amendments were made to the contract of April 23, 1935, none of which substantially affected the provisions respecting the use of the trade names.

Thereafter Century operated under the licensing

agreement until July 1, 1940, and royalties paid pursuant thereto were claimed and allowed as deductions for income tax purposes. During the period from June 30, 1935, to July 1, 1940, Century sold alcoholic malt beverages in Washington and the Territory of Alaska under the name of "Rainier" in quantities set out below and paid "royalties" thereon as follows:

Year ended June 30—	Barrels sold	Royalties paid
1936	60,171.51	$75,000.00
1937	82,881.50	75,000.00
1938	114,308.16	85,731.12
1939	112,538.17	84,403.63
1940	131,355.59	98,834.47
Total	501,254.93	418,969.22

On July 1, 1940, Century exercised the option granted to it in paragraph thirteenth of the agreement and executed and delivered to petitioner promissory notes in the aggregate amount of $1,000,000, bearing interest at 5 per cent and payable on five equal maturity dates of one, two, three, four, and five years, respectively, thereafter. These notes were made payable to petitioner. Note No. 1, in the amount of $200,000, was paid on its due date July 1, 1941. Notes Nos. 2 and 3, for $200,000 each, payable on July 1, 1942, and July 1, 1943, respectively, were paid in 1942. In consideration for the advance payment petitioner granted to Century, subject to all the terms and conditions of the contract of April 23, 1935, the "sole and perpetual right and license" to manufacture and market alcoholic malt bever-

ages within the State of Idaho under the trade names and brands "Rainier" and "Tacoma" without any payment therefor other than the payment of the remaining promissory notes given by Century in settlement of all royalty payments under the agreement of April 23, 1935.

In the fall of 1942 Century arranged to pay in advance the notes of July 1, 1944, and July 1, 1945, in the principal amount of $200,000 each, together with interest thereon, less $10,000 of such interest, in consideration of petitioner (1) releasing the properties held by the First National Bank of Seattle, as trustee, from the lien thereon and directing the conveyance of such property to Century; (2) releasing the provisions in the contract of April 23, 1935, for the purchase of malt from petitioner; and (3) amending the contract of April 23, 1935, so as to permit the manufacture and sale of beer under the trade names of "Rainier" and "Tacoma" to any plant or plants owned or controlled by Century within the States of Idaho and Washington and the Territory of Alaska without the necessity of securing the written consent of petitioner in connection therewith.

Aside from the changes indicated above as consideration for advance payment of the notes and accrued interest thereon, no changes were made in the contract of April 23, 1935, after the election by petitioner to exercise the right to "terminate the payment of all royalties" by the payment of $1,000,000.

Upon the exercise of the option and the execution and delivery to petitioner of its promissory notes aggregating $1,000,000, Century acquired the perpetual and exclusive right to manufacture and market beer, ale, and other alcoholic malt beverages within the State of Washington and the Territory of Alaska without any further payments and without regard for the amount of alcoholic malt beverages so manufactured and sold.

By the exercise of the option, as provided in paragraph thirteenth of the contract, and the payment of the consideration of $1,000,000, [39] Century acquired the exclusive and perpetual right to manufacture and sell alcoholic malt beverages in the designated territory under the trade names "Rainier" and "Tacoma." This transaction constituted the sale and acquisition of a capital asset.

From the time of its organization in 1893 to 1915 the predecessor of petitioner had brewery and manufacturing facilities located at Seattle in the State of Washington. In the fall elections of November 1914 the State of Washington adopted prohibition, effective January 1, 1916, and in 1915 Seattle, a predecessor of petitioner, moved its manufacturing business from the State of Washington to the State of California, where it built a brewery at San Francisco and removed thereto all of the brewing machinery from its Washington plant, except the cold storage facilities. After 1915 the plant in Seattle was not operated as a brewery, but was used

for storage of "Rainier" products which were shipped from San Francisco for sale in the State of Washington. These products during the era of national prohibition consisted of near beer containing one-half of one per cent alcohol.

Upon the repeal of prohibition in 1933 petitioner began the sale of "Rainier" beer and other alcoholic malt beverages in the State of Washington under the trade name "Rainier," which it continued until 1935, when it entered into the agreement under which Century acquired the exclusive and perpetual right to manufacture and sell alcoholic malt beverages under the trade names "Rainier" and "Tacoma" in the State of Washington and the Territory of Alaska and petitioner agreed not to compete with Century in the sale of alcoholic malt beverages under these trade names in the limited territory designated in the agreement.

From 1908 (and prior thereto) until 1913 a predecessor of petitioner sold alcoholic malt beverages under the trade name "Rainier" in the States of Washington, Montana, Nevada, Arizona, California, and Oregon, and also exported beer to the Orient, Central America, Honolulu, and South America.

In the State of Washington during the period 1908 to 1913 beer was distributed through a licensing system under which the brewery would set up a saloon or acquire the license to a saloon. These saloons, termed "captive saloons," would then dis-

pense only the beer of the brewery holding the license. In 1913 Seattle, a predecessor of petitioner, owned 21 saloons and licensed considerably more. During the five-year period ended June 30, 1913, Seattle's investment in the 21 captive saloons averaged $79,347.28. Such investments were included in plant properties, in financial statements, or balance sheets.

In 1909 the State of Washington passed a local option law which provided for a vote on the liquor question in towns, cities, and the unincorporated portions of counties as separate units. In 1910 70 municipal [40] local option elections were held in the state, of which 35 voted dry, abolishing thereby 129 saloons. Of the 38 counties of the state, 10 voted under the rural county law during 1910, of which number 9 voted dry, abolishing thereby from the rural districts of these counties 40 saloons, the total number of saloons abolished during 1910 being 169. In 1912 129 elections were held, 84 of which resulted in dry victories, while 45 resulted in wet victories. As a result of these elections 360 saloons were abolished and 71 per cent of the area of the state was made dry. The unincorporated portions of 19 counties were without saloons, 4 counties were entirely dry, and 71 municipalities, including 15 county seats, had no license. In 1913 220 elections were held under the local option law, 140 of which resulted in dry victories, while only 80 resulted in wet victories. As a result of these elections, 572 saloons were abolished and 87 per cent

of the area of the state was made dry. In that year the unincorporated portions of 34 counties were without saloons and 6 counties were entirely dry. In 1913 most of the railroads had discontinued the sale of intoxicating liquors and the steamboat companies were rapidly following the example of the railroads. At that time the question of state prohibition was a live issue in the State of Washington. In 1912 and 1913 over 300 news articles and 33 editorials were published on the subject in 4 of the leading newspapers of the state. Articles on the subject appeared in leading magazines and in the yearbooks of the Anti-Saloon League and United States Breweries Association, which were available to persons desiring such information.

At March 1, 1913, local option was increasing in the State of Washington and there was a definite trend toward state-wide prohibition. The state went dry in the election of November 3, 1914. The vote was for prohibition 189,840, against 171,208.

During the fiscal year ended June 30, 1913, the management of Seattle, a predecessor of petitioner, authorized the expenditure of $128,000 on plant improvements. Substantial expenditures were made by other breweries about this time.

The following table shows sales of petitioner's predecessor in barrels and the net income from sales within and without the State of Washington for the fiscal years ended June 30, 1908, through June 30, 1912:

Year	Washington		Outside of Washington		Total	Total
	Barrels	Net income	Barrels	Net income	barrels	net income
1908	162,571	$293,353.00	98,232	$77,662.00	260,803	$371,015.00
1909	161,710	298,387.00	83,480	36,316.00	245,190	334,703.00
1910	172,612	303,160.00	93,523	38,083.00	266,135	341,243.00
1911	178,283	326,880.00	111,287	76,263.00	289,570	403,143.00
1912	171,902	353,603.00	137,909	111,381.00	309,811	464,984.00
Average	169,415	315,077.00	104,886	67,941.00	274,301	383,018.00

Of the total average net income for the five years ended June 30, 1912, 82.25 per cent is allocable to sales within the State of Washington and 17.75 per cent is allocable to sales in the territory outside of Washington.

The following table shows the petitioner's precedessor's tangible assets invested in the brewery business for the fiscal years from June 30, 1907, through June 30, 1912, including accounts receivable, but excluding bills receivable shown on the balance sheets as "investments":

	June 30, 1907	June 30,1908	June 30, 1909	June 30, 1910	June 30, 1911	June 30, 1912
Current assets	$887,791.19	$903,354.68	$922,109.77	$855,690.85	$964,834.57	$1,150,692.53
Deferred charges....	16,317.23	9,925.81	14,852.32	13,596.24	18,301.97	14,854.84
Fixed assets—net..	1,687,211.68	1,835,185.10	1,844,162.75	1,855,896.37	1,905,017.46	1,954,843.94
Total	2,591,320.10	2,748,465.59	2,781,124.84	2,725,183.46	2,888,154.00	3,120,391.31
Less current liabilities	496,794.41	409,898.16	314,980.63	166,690.26	153,237.03	217,363.25
Net tangible assets	2,094,525.69	2,338,567.43	2,466,144.21	2,558,493.20	2,734,916.97	2,903,028.06

The average value of tangible assets during the five years ended June 30, 1912, was $2,519,379.74.

The bills receivable shown on the balance sheets for the same period were as follows:

	June 30, 1907	June 30,1908	June 30, 1909	June 30, 1910	June 30, 1911	June 30, 1912
Bills receivable	$318,179.07	$292,206.10	$385,090.78	$449,371.14	$520,410.32	$ 598,353.75

In its income tax return for 1940 petitioner computed the value of its good will as of March 1, 1913, to be in excess of $1,000,000, which is used as a basis for computing profit or loss on the transaction in 1940, in which it granted to Century the perpetual and exclusive right to use the trade names "Rainier" and "Tacoma" in connection with the manufacture and sale of alcoholic malt beverages in the State of Washington and the Territory of Alaska in consideration of promissory notes aggregating $1,000,000. In computing the value of good will as of March 1, 1913, it used the average value of tangible assets during the five years ended June 30, 1912, which it determined to be $2,519,379.74 and the average net earnings for the same period, $383,018.91. In computing the value of the "trade-names and other intangibles" as of March 1, 1913, it allowed 8 per cent return on the average value of tangible assets, or $201,550.38, and excess earnings of $181,468.53, applicable to intangible assets. The amount applicable to intangibles was capitalized at 15 per cent, or $1,209,790.20, which it treated as the "estimated March 1, 1913, value of trade-names and other intangible assets which were sold by virtue of the grant of a [42] perpetual right to the use thereof to the Seattle Malting and Brewing Co. during 1940."

The fair market value, as of March 1, 1913, of the trade names "Rainier" and "Tacoma" apportionable to the State of Washington and the Territory of Alaska was $514,142.

Petitioner's predecessors filed income tax returns for the years 1918, 1919, and 1920, but claimed no deductions therein for obsolescence of good will or trade names. In July 1920 Seattle filed a claim for abatement of taxes for the year 1919, based on a claim for obsolescence of good will. In this claim it computed the value of the good will of Seattle as of March 1, 1913 (based on the average invested capital for the years 1903 to 1913, inclusive, which was capitalized at 10 per cent and an average earning for the same period of $81,336.04 which was capitalized at 15 per cent), to be $542,240.27. The Commissioner computed the good will value as of March 1, 1913, to be $406,680.20, which was arrived at by using the same figures as those used by Seattle, but changing the capitalization rate of good will from 15 per cent to 20 per cent. He then allocated the amount of $406,680.20 to the following years in the following amounts:

1918	$345,061.95
1919	59,153.48
1920	2,464.77
Total	406,680.20

Petitioner's predecessors, Seattle and Rainer, derived tax benefits from such allocation as follows:

1918	$78,983.92
1919	59,153.48
Total	138,137.40

In determining the deficiency here in question the respondent treated the $1,000,000 received by peti-

tioner in 1940 as ordinary income and included the entire amount in petitioner's gross income.

Opinion

Harron, Judge: Issue 1.—The first issue raised by the pleadings is whether $1,000,000 is notes received by petitioner in 1940, in consideration of the exclusive and perpetual right to use the trade names "Rainier" and "Tacoma" in the manufacture and sale of alcoholic malt beverages in the State of Washington and the Territory of Alaska, was ordinary income and taxable as such. The question turns on whether the sum of $1,000,000 is to be regarded as prepaid royalties, or whether it is to be regarded as an expenditure in the acquisition of a capital asset. [43]

The decision of this issue is governed by the decision in Seattle Brewing & Malting Co., 6 T. C. No. 856. In that case the issue was whether the taxpayer (the purchaser) was entitled to deduct from its income any portion of the $1,000,000 which on July 1, 1940, it agreed to pay to Rainier upon the exercise of the option of electing to terminate all royalties payable under the contract of April 23, 1935, under a theory that the $1,000,000 constituted a payment of royalties. The contract there under consideration was the same contract which we have before us here, and the decision of the question depended upon whether the $1,000,000 was paid in the acquisition of a capital asset or whether it was royalties paid under a licensing agreement. The evidence in the instant case is not materially different

from the evidence presented in the Seattle case. In that case we said:

> * * * We find no ambiguity in the contract and the language in paragraph thirteenth is clear. It provides that at any time after five years petitioner "shall have the right and option of electing to terminate all royalties thereafter payable hereunder" by executing and delivering to Rainier its promissory notes in the principal sum of $1,000,000. Obviously, it was intended that after the execution of the notes all royalty payments as such should cease. The agreement admits of no other construction. Thereafter Rainier must look for payment to the promissory notes and not to the contract. The execution and delivery of the notes put an end to the payment of royalties on a barrelage basis and was the consideration for the exclusive and perpetual use of such rights thereafter. It is our opinion that upon the exercise of the option petitioner acquired a capital asset for which it paid $1,000,000. * * *

Upon the authority of Seattle Brewing & Malting Co., supra, we hold that the transaction here in question was a capital transaction and the sum received by petitioner for the exclusive and perpetual right to use the trade names in the manufocture and sale of alcoholic malt beverages within the limited territory was not ordinary income within the purview of section 22 of the Internal Revenue Code.

Issue 2.—Since the sum which petitioner received

from Century on July 1, 1940, did not constitute ordinary income, but represented a payment for a capital asset, a question arises whether or not petitioner realized any gain from the transaction as it was carried out by Century. It is the contention of the petitioner that the entire face amount of the notes received in 1940 upon the exercise of the option constitutes proceeds from a sale, and that it is entitled to use as its basis, for the computation of gain or loss on the transaction, the March 1, 1913, value of the trade names, and that such value was in excess of the $1,000,000 received. Petitioner concedes, however, that in computing the adjusted basis for such property there should be deducted the sum of $138,137.40, which is that portion of the total amount of $406,680.20 "allowed" by respondent as a deduction for obsolescence of [44] good will to petitioner's predecessor in the years 1918 to 1920, inclusive, which represented a tax benefit to petitioner's predecessor.

The respondent, on the other hand, contends that petitioner is not entitled to use the March 1, 1913, value, if any, as the basis for the trade names and good will, since such property was wholly destroyed by the advent of national prohibition in 1920, and since petitioner has not shown any cost allocable to trade names incurred since that date, the new basis for the revived trade names must be considered to be zero. He further challenges the value of the trade names contended for by the petitioner and, in the alternative, contends that the agreement not to compete can not be regarded as part of the trade

names or good will transferred; that at least one-half of the $1,000,000 in option notes constituted compensation to petitioner for its agreement not to compete in the beer business in the Washington area, and was, therefore, ordinary income to petitioner; and that, accordingly, the amount received as proceeds from the sale can not be in excess of $500,000. He further contends, in the alternative, that there must be deducted from the March 1, 1913, value, in order to find an adjusted basis, the entire sum of $406,680.20 which was "allowed" as obsolescence of petitioner's predecessor for the years 1918 to 1920, inclusive.

The respondent's contention that petitioner is not entitled to use the March 1, 1913, value, if any, as the basis for the trade names and good will disposed of in 1940, because such property was wholly destroyed by the advent of national prohibition, does not find support in the record. There is no evidence whatever in the record that the trade name "Rainier" became worthless as a result of prohibition. Indeed the record conclusively establishes the contrary. The trade name was never abandoned during prohibition, but was used in the sale of near beer and soft drinks under such labels as "Rainier," "Rainier Lager," "Rainier Old German Lager," and "Rainier Malt Tonic" throughout the period of state prohibition in Washington and national prohibition thereafter. Moreover, the registration of its trade names in the United States Patent Office and in the State of Washington was kept alive from 1898 down to the present time, having been renewed

from time to time during this period. Upon the repeal of prohibition after 1932 "Rainier" beer was again put on the market by petitioner. Although it is obvious that the value attaching to the trade name "Rainier" and the good will of petitioner's predecessor corporations fluctuated very materially during the period from 1915 to 1933, it nevertheless does not follow that Rainier lost the use of its 1913 basis. The good will survived and it is immaterial that its value revived after prohibition. It has never been supposed that the fluctuation of value of property would destroy the taxpayer's basis. In fact, if a deduction has been taken for worthlessness, such deduction will [45] deprive a taxpayer of its basis only to the extent, that it results in a tax benefit. Cf. Estate of James N. Collins, 46 B. T. A. 765; affd., 320 U. S. 489, and John V. Dobson, 46 B. T. A. 770; affd., 320 U. S. 489. We are of the opinion that the petitioner's basis for determining gain or loss upon the sale of its trade names and good will in 1940 is the fair market value of such property as of March 1, 1913, adjusted under section 113 (b) (1) (B) of the Internal Revenue Code.

In the instant case it is apparent that the good will value to be applied against the amount received for the trade names in 1940 is the value of the trade names as of March 1, 1913, so the value to be placed thereon is what a willing buyer, with a full knowledge of the facts, would pay and a willing seller, not acting under any compulsion to sell, would accept for such property. In the computations by the petitioner's expert witnesses there has been no al-

lowance for the value of good will, as such, separate and apart from the trade names used in the business. The petitioner insists that the good will, as mathematically computed under an approved formula, represents the value of the trade names. Good will is an intangible, and just what goes into the caldron to make up the sum of its ingredients is sometimes difficult to determine, but it would seem clear that the value of the trade names was not the full content of good will value attached to the business of petitioner's predecessors as of March 1, 1913. In determining the value of the trade names, we have taken into consideration all of the evidence in the record, including the stipulations of the parties, the opinions of the expert witnesses, and the methods used by them in arriving at their estimated values of the good will as of March 1, 1913. We have also considered the fact that the total value of good will included other elements besides the value of the trade names, and that there was a pronounced trend toward prohibition in the State of Washington, where 82 per cent of the income from sales of petitioner's products was realized. Moreover, we have assumed a buyer conversant with all these facts. In our judgment the value of the trade names here in question as of March 1, 1913, was $514,142, and we have so found as a fact.

In C. C. Wyman & Co., 8 B. T. A. 408, we said that good will is not necessarily confined to a name. It may as well attach to a particular location where the business is transacted, or to a list of customers, or to other elements of value in the business as a going

concern. In Ithaca Trust Co. v. United States, 279 U. S. 151, Justice Holmes said that the value of the thing to be taxed must be estimated as of the time when the act is done, "but the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market." Obviously "relative intensity of the social desire" for the trade names "Rainier" [46] and "Tacoma" at March 1, 1913, would have been tempered by all of the hazards incident to the business and the future prospects of gain then apparent from the use of such trade names.

Issue 3.—The above holdings brings us to the third question, relating to the adjusted basis to be used for determining gain or loss from the transaction in 1940 wherein the petitioner granted and the purchaser, Century, acquired an exclusive and perpetual right to use the trade names "Rainier" and "Tacoma" in the manufacture and sale of alcoholic malt beverages in the State of Washington and the Territory of Alaska for $1,000,000. The applicable provision of the statute is set out in the margin.[1]

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[1]Sec. 113 (I. R. C.). Adjusted Basis for Determining Gain or Loss.

(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

* * * * * * *

(14) Property Acquired Before March 1, 1913.—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted (for the period prior to March

It appears from the record that petitioner's predecessors filed income tax returns for the years 1918, 1919, and 1920, but claimed no deduction therein for obsolescence of good will or trade names. In July 1920 Seattle, a predecessor, filed a claim for abatement of taxes for the year 1919 based on a claim for obsolescence of good will due to prohibition legislation. The Commissioner computed the good will value as of March 1, 1913, to be $406,680.20. Of this amount $345,061.95 was allocated to the year 1918, $59,153.48 to the year 1919, and $2,464.77 to the year 1920. It is stipulated that petitioner's predecessors derived tax benefits from such allocation in the amounts of $78,983.92 for the year 1918 and $59,-153.48 for the year 1919, making a total of $138,-137.40. The respondent now argues that $406,680.20 was "allowed" for obsolescence of good will and that this amount must be deducted from the March 1,

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1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value. * * *

(b) Adjusted Basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) General Rule.—Proper adjustment in respect of the property shall in all cases be made—

* * * * * * *

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence * * * to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws. * * *

1913, value as determined here in computing the adjusted basis under section 113 (b) (1) (B) of the Internal Revenue Code. The respondent relies on Virginian Hotel Corporation of Lynchburg v. Helvering, 319 U. S. 523; rehearing denied, 320 U. S. 810, and Commissioner v. Kennedy Laundry Co., 133 Fed. (2d) 660; certiorari denied, 319 U. S. 770; rehearing denied, 320 U. S. 810. It is the petitioner's position that because no claim was made by its predecessors for obsolescence for the years 1918 and 1920 the amount allocated to those years by the Commissioner, as to which no tax benefit was realized, has not been "allowed" within the meaning of section 113 (b) (1) (B) or within the decision of the Supreme Court in the Virginian Hotel case. It argues that no amount was "allowable" for obsolescence of good will due to prohibition within the decision of the Supreme Court in Clarke v. Haberle Crystal Springs Brewing Co., 280 U. S. 384, and, therefore, the amount of obsolescence "allowed" must be limited to the amount as to which a tax benefit was realized.

The Virginian Hotel case, supra, dealt solely with tangible assets. It is apparent from a perusal of the decision and the dissents thereto that the purpose of the statute was to limit depreciation to the taxable year in which it occurred and not permit the taxpayer to accumulate and apply it in a subsequent year when it would better suit his purpose. The Court pointed out that the provision in the statute makes it plain that the depreciation basis is reduced by the amount allowable each year,

whether or not claimed, and that the basis must be reduced by that amount even though no tax benefit results from the use of depreciation as a deduction. "Wear and tear do not wait on net income." This situation can only arise in cases dealing with depreciable property. In the opinion the Court said:

> * * * "Allowed" connotes a grant. Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them. Income tax returns entail numerous deductions. If the deductions are not challenged, they certainly are "allowed" since tax liability is then determined on the basis of the returns. Apart from contested cases, that is indeed the only way in which deductions are allowed."

Annual depreciation in the case of good will is not permissible, because from the very nature of the asset is not depreciable. Annual depreciation can only arise in cases dealing with depreciable property. Where, as in the case here, we have non-depreciable property the same situation does not obtain. A trade name is built up over the years and in the normal course of events is appreciated rather than depreciated, so that there is no amount allowable for exhaustion during a taxable year unless during that year there is a destruction of such intangible property. The Virginian Hotel case, supra, is, therefore, not controlling here. It is distinguishable on its facts and the rationale of that

decision is not applicable here. The same may be said of Commissioner v. Kennedy Laundry Co., supra, also relied upon by the respondent.

A more serious objection to the respondent's claim, however, is the fact that the Supreme Court in Clarke v. Haberle Crystal Springs Brewing Co., supra, held that exhaustion or obsolescence of good will due to the prohibition amendment was not within the intendment of [48] the statute. In the opinion Mr. Justice Holmes, speaking for the Court, said:

> * * * It seems to us plain without help from Mugler v. Kansas, 123 U. S. 623, that when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due. It seems to us no less plain that Congress cannot be taken to have intended such a partial compensation to be provided for by the words "exhaustion" or "obsolescence." Neither word is apt to describe termination by law as an evil of a business otherwise flourishing, and neither becomes more applicable because the death is lingering rather than instantaneous.

It is well settled that, when the Supreme Court declares an act of the legislature to be unconstitutional, such an act never was law and was never binding as law. By the same token, where the Supreme Court has declared that the words "exhaustion" and "obsolescence" as used in the reve-

nue laws do not include a loss of good will due to the prohibition amendment, the interpretation of the revenue laws must be to the effect that such a deduction was never granted by Congress. Since such deduction was never allowable under the revenue laws, it is difficult to see how the Commissioner by "allowing" a deduction which was never claimed can bind the taxpayer by such deduction as "allowed" within the meaning of the revenue act. In other words, a deduction "allowed," but not claimed or actually taken, can hardly be said to be "allowed" where there was no basis in the statute for such an allowance. Certainly, exhaustion and obsolescence can not be said to be allowed in the sense that those terms are used and understood by the Supreme Court in the Virginian Hotel case, supra, when applied to non-depreciable intangible assets. See also Renziehausen v. Lucas, 280 U. S. 387. We hold, therefore, that, for the purpose of computing the adjusted basis, the fair market value of the trade names as of March 1, 1913, can only be reduced by such amounts as petitioner's predecessors received tax benefits therefrom, the amount of $138,137.40.

Issue 4.—The fourth and last question is whether any part of the $1,000,000 received by petitioner in 1940 should be allocated to petitioner's agreement not to compete which is set out in paragraph ninth of the contract of April 23, 1935. The petitioner contends that such agreement was incidental to the grant by it of an exclusive and perpetual right to use the trade names, and that the agreement had no value separate and apart from the

trade names or good will. The respondent contends that at least $500,000 of the $1,000,000 paid on the exercise of the option agreement must be considered as an amount paid for the agreement not to compete.

In determining the deficiency, the respondent treated the $1,000,000 which petitioner received in 1940 as ordinary income under the royalty [49] contract, and neither in the deficiency notice[2] nor in the pleadings[3] is any value assigned by the respond-

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[2]"(a) In the taxable year you received a payment of $1,000,000.00 from the Century Brewing Association under a contract executed in 1935 whereby you granted to Century Brewing Company a license to use trade names, held by you, in connection with the marketing of beer, ale, and other alcoholic liquors made from malt, in the State of Washington and the Territory of Alaska. No income from such payment was reported in your return for 1940. You contend that the receipt of $1,000,000.00 represented the proceeds of a sale by you of good will and an interest in the trade names; that such good will and trade names have a basis, represented by the market value at March 1, 1913, in excess of the proceeds; that hence no deductible loss was allowable and no taxable gain was reportable. It is held that the contract executed in 1935 did not effect a sale of trade names or good will; that the payment of $1,000,000.00 received by you in 1940 was ordinary income taxable in full without any offset for the claimed basis.

It is further held that since the transaction did not constitute a sale, the income realized in 1940 may not be excluded from excess profits net income under section 721 of the Internal Revenue Code."

[3]Paragraph 5 (k) of the petition alleges:

"During the year 1940 Century exercised the option granted to it by said contract and delivered

ent to the agreement not to compete, and no mention is made of it. Without any question, it is well settled that any amount received for an agreement not to compete would be taxable as ordinary income. Estate of Mildred K. Hyde, 42 B. T. A. 738; John D. Beals, 31 B. T. A. 966; affd., 82 Fed. (2d) 268; Christensen Machine Co., 18 B. T. A. 256; Christensen Machine Co. v. United States (Ct. Cls.), 50 Fed. (2d) 282. There is, however, no direct evidence in the record as to the value of the agreement not to compete, nor does it appear that Century would not have purchased the exclusive right to the trade names without the agreement not to compete. Certainly there is nothing in the record to indicate that such agreement not to compete was worth $500,000.

It is obvious that in 1935, when the contract between petitioner and Century was entered into, an agreement not to compete had a substantial value, and it can not be said that paragraph ninth of the contract was mere words. It was perfectly possible for petitioner to sell the exclusive and perpetual right to use its trade names in the limited territory without any agreement not to compete, and it is conceivable that in that situation it might have

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to petitioner promissory notes in the principal amount of $1,000,000.00, as a lump sum payment for the exclusive and perpetual right and license thereafter to manufacture and market beer, ale and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade names and brands of 'Rainier' and 'Tacoma'." This allegation was admitted by the respondent in his answer.

continued selling beer in the territory under another trade name. Undoubtedly such competition, backed by petitioner's advertising and sales organization and by the good will attached to its corporate name, would have had some effect upon the sale of beer by Century under the trade name "Rainier." Moreover, there was obviously a nuisance value attaching to the right to compete which the purchaser of the trade name would want to eliminate, but any competition would be seriously narrowed by the equity rule, which [50] was followed in the State of Washington, that the sale of the good will of a business carries with it an implied covenant by the seller that he will not solicit the custom for which the purchaser paid, and with which he parted, for the consideration received. So, while the petitioner, in the absence of an agreement not to compete, might have been at liberty to engage in a similar business in the same locality in his own name, it is very doubtful whether he could have sold the same beer under another name and advertised the fact without being enjoined by the purchaser of his trade names. In Cooper & Co. v. Anchor Securities Co. (Supreme Court of Washington, 1941), 113 Pac. (2d) 845, suit was brought to restrain Anchor Securities Co. and its officers from directly soliciting insurance business from defendant's former customers after a sale of the business and good will to the plaintiff. In its opinion, holding that an injunction should issue, the court said:

> In the absence of express or implied conditions in the contract of sale of a business to-

gether with the good will thereof to the contrary the vendor is at liberty to set up a similar business in the same locality and carry it on in his own name. Annotations 11 Ann. Cas. 573 et seq; 19 L. R. A., N. S., 762 et seq; 82 A. L. R. 1030 et seq. However, the sale of good will of a business carries with it, even in the absence of a restrictive covenant, the implied obligation that the seller will not solicit his old customers or do any act that would interfere with the vendee's use and enjoyment of that which he had purchased.

Upon the advent of prohibition in Washington petitioner built a brewery in California and thereafter manufactured beer in that state. Having resumed the sale of beer in the State of Washington after the repeal of prohibition in 1933, it had undoubtedly built up an advertising and sales organization for that state. When the contract of April 23, 1935, was entered into it owned the old brewery property at Seattle, which it used for offices and as a cold storage plant and warehouse. But under the contract the old brewery property was sold to Century and petitioner discontinued its beer business in the State of Washington. This situation continued during the five-year period from 1935 to 1940, during which time its transactions with Century were on a royalty basis, so that in 1940, when petitioner sold the exclusive and perpetual right to use its trade names and brands in connection with the manufacture and sale of alcoholic malt beverages, it was not engaged in any business of selling

alcoholic malt beverages in the State of Washington. During this five-year period, from 1935 to 1940, Century had built up its sales of "Rainier" beer through advertising and its own sales organization from 60,000 barrels sold in 1936 to 131,000 barrels sold in 1940, so that the agreement by petitioner not to compete had little, if any, value in 1940. In the opinion of the Board of Tax Appeals in Christensen Machine Co., supra, it was said, in discussing an agreement not to compete for a period of five years: [51]

> * * * It (the purchaser) thus obtained the right to conduct its business free from Christensen's competition during a period when it was not in a strong position. This was a valuable asset in the hands of the petitioner, the benefits of which would continue over a period which would not necessarily be coextensive with the five-year period provided in the agreement. To illustrate, the petitioner in two years' time might have so strengthened its position that Christensen's competition could not affect it, or in the five years it might have so strengthened its position that as a consequence for one or more years thereafter Christensen's competition would be less severe than it otherwise would have been. The fact remains, however, that as each year passed, the time was that much nearer when the benefits derived from the contract would be completely exhausted. (Emphasis supplied.)

It must be borne in mind that the sale here in question was made in 1940 and not in 1935. In our judgment, considering all of the facts and the legal restrictions under which petitioner would have had to compete had it chosen to do so, we are of the opinion that any value which the agreement not to compete had in 1935 had been exhausted when, in 1940, Century elected to exercise the option and purchase the exclusive and perpetual right to use the trade names in its business.

We hold, therefore, that no part of the $1,000,000 received by petitioner for the exclusive and perpetual right to use its trade names in the State of Washington and the Territory of Alaska was received in payment for its agreement not to compete with the purchaser in that territory.

Decision will be entered under Rule 50. [52]

[Title of Tax Court and Cause.]

DECISION

Pursuant to the Findings of Fact and Opinion in this proceeding which were promulgated on June 18, 1946, respondent filed a recomputation under Rule 50, in which petitioner acquiesces. Accordingly, it is

Ordered and Decided: That for the year 1940 there is a deficiency in income tax in the amount of $149,548.89; that there are no deficiencies in de-

clared value excess profits tax and excess profits tax; and that for the year 1941 there is a deficiency in excess profits tax in the amount of $15,338.15.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered Aug. 12, 1946. [53]

In the United States Circuit Court of Appeals
for the Ninth Circuit

T. C. No. 4895

COMMISSIONER OF INTERNAL REVENUE
Petitioner on Review,
vs.
RAINIER BREWING COMPANY,
Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes the Commissioner of Internal Revenue, by his attorneys, Sewall Key, Acting Assistant Attorney General; J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That this proceeding is concerned with a redetermination of Federal income, declared value excess

profits, and excess profits tax liability of the respondent, Rainier Brewing Company (sometimes hereinafter referred to as the taxpayer), for the taxable year 1940 and excess profits tax liability for the year 1941. The taxpayer's income and excess profits tax returns for the taxable years 1940 and 1941 were filed with the Collector of Internal Revenue for the First California District whose office is located in the City of San Francisco, California, and within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. [54]

II.

The nature of the controversy is as follows, to wit:

The taxpayer is a corporation organized under the laws of the State of California with its principal office and place of business in the City and County of San Francisco, California. Prior to the advent of prohibition a company by the name of Seattle Brewing & Malting Company had sold beer in the Seattle area under the name "Rainier." The taxpayer is the successor of the latter company. The value of the name "Rainier" having been developed through extensive prior use, a competitor of the taxpayer known as the Century Brewing Association approached officers of the taxpayer during the year 1935, following the repeal of prohibition, with a view to acquiring from the taxpayer the right to use the trade name "Rainier" and "Tacoma" in the manufacture and sale of beer and alcoholic beverages in the State of Washington and the territory of Alaska and to have the name Seattle Brewing &

Malting Company. A contract was entered into between the taxpayer and the Century Brewing Association on April 23, 1935. This contract sold certain plant, equipment and facilities, and in addition licensed to the Century Brewing Association the "sole and exclusive perpetual right and privilege" of manufacturing and marketing beer and other alcoholic malt beverages under the name "Rainier" within Washington and Alaska. Payment for the right to use the trade name was to be on a barrelage royalty basis, with a provision that at its option after five years Century could terminate all future royalties on a barrelage basis by executing promissory notes payable over a period of five years and totaling $1,000,000. The contract also provided that the taxpayer would not compete within the stated territory; that it would maintain the trade name registration; that Century would maintain quality of product equal to that of the taxpayer; that Century would expend sums advertising [55] "Rainier" at least equal to that of other brands; and that it would not assign any rights under the contract without the consent of the taxpayer. In 1940 Century elected to terminate payment on the barrelage royalty basis and executed five non-negotiable notes of $200,000 each, due successively in each of five years. The notes were later paid before maturity in consideration of the grant of the use of the name of "Rainier" in Idaho and because of other considerations.

III.

In its income tax return for the year 1940 the taxpayer computed the value of its good will as of March 1, 1913, to be in excess of $1,000,000 which value was used by it as a basis for computing profit or loss on the transaction in 1940 in which it granted to Century the perpetual and exclusive right to use the trade names "Rainier" and "Tacoma" in connection with the manufacture of beer and alcoholic beverages in the State of Washington and the Territory of Alaska in consideration of Century's promissory notes aggregating $1,000,000. In his deficiency determination the Commissioner treated the $1,000,000 received by the taxpayer in 1940 as ordinary income, rather than the proceeds from the sale of a capital asset, and accordingly included the entire amount in the taxpayer's gross income. It was further held by the Commissioner that since the transaction did not constitute a sale, the income received in 1940 could not be excluded from excess profits net income under Section 721 of the Internal Revenue Code. The Tax Court of the United States held that the amount received by the taxpayer in 1940 constituted proceeds from the sale of a capital asset andwas not, therefore, ordinary income. The Tax Court also [56] held that the taxpayer's basis for determining gain or loss on the sale of its trade names and good will in 1940 was the fair market value of such property as of March 1, 1913, adjusted under Section 113(b)(1)(B) of the Internal Revenue Code, the fair market value so determined being $514,142 less the amount of $138,137.40, a por-

tion of a total amount of $406,680.20 which the Commissioner had previously allowed as a deduction for obsolescence of good will to the taxpayer's predecessors in the years 1918, 1919 and 1920, the smaller amount of $138,137.40 representing a tax benefit received by the taxpayer's predecessors for the years 1918 and 1919 from such allowance. The Tax Court's findings of fact and opinion was promulgated on June 18, 1946, and its decision pursuant to such opinion was entered on August 12, 1946, "that for the year 1940 there is a deficiency in income tax in the amount of $149,548.89; that there are no deficiencies in declared value excess profits tax and excess profits tax; and that for the year 1941 there is a deficiency in excess profits tax in the amount of $15,338.15."

IV.

The petitioner being aggrieved by the Tax Court's findings of fact and opinion dated June 18, 1946, and by its decision entered on August 12, 1946, desires to obtain a review thereof before the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the provisions of Sections 1141 and 1142 of the Internal Revenue Code. [57]

Wherefore, he petitions that a transcript of the record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit and transmitted to the Clerk of said Court for filing and appropriate action, to the end that the errors complained of may be reviewed

and corrected by the said United States Circuit Court of Appeals for the Ninth Circuit.

/s/ SEWALL KEY,
CAR
Acting Assistant Attorney General.

/s/ J. P. WENCHEL
CAR
Chief Counsel, Bureau of Internal Revenue,

Attorneys for Petitioner on Review.

Of Counsel:
CHAS. E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. Nov. 5, 1946. [58]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: A. Calder Mackay, Esquire,
728 Pacific Mutual Building,
Los Angeles 14, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 5th day of November, 1946, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of

The Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 5th day of November, 1946.

/s/ J. P. WENCHEL CAR
Chief Counsel, Bureau of Internal Revenue,
Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 8th day of November, 1946.

/s/ A. CALDER MACKAY,
Attorney for Respondent on Review.

Received and Filed T.C.U.S. Nov. 14, 1946. [59]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Rainier Brewing Company,
1550 Bryant Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 5th day of November, 1946, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court

of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 5th day of November, 1946.

/s/ J. P. WENCHEL CAR
Chief Counsel, Bureau of Internal Revenue,
Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 12th day of November, 1946.

RAINIER BREWING COMPANY.

By /s/ F. S. SMITH,
Secretary,
Respondent on Review.

Received and Filed T.C.U.S. Nov. 18, 1946. [60]

The Tax Court of the United States

Docket No. 4895

RAINIER BREWING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that—

I.

The re-organization referred to in Paragraph V (e) of the Petition and Answer herein was a non-taxable re-organization within the meaning of the applicable provisions of the Internal Revenue Laws, whereby Seattle Brewing and Malting Co. (the West Virginia corporation) and its wholly-owned subsidiary, Rainier Brewing Company (the Washington corporation), made the transfers to Pacific Products, Inc. referred to in Paragraph V (e) of the Petition, without the recognition of any gain or loss, in exchange solely for the stock or securities of Pacific Products, Inc., and immediately after the transfer an interest or control in such assets of 50 per centum or more remained in the same persons. Attached hereto, marked Exhibits "A" and "B," and made a [61] part hereof, are true and complete cop-

ies of the assignments by which said transfers were effected.

II.

In the year 1932 Pacific Products, Inc. transferred to Rainier Brewing Company, Inc. (a California corporation organized in 1932), its assets of every kind and description, save and except certain designated assets not used in the conduct of its manufacturing business. Attached hereto, marked Exhibits "C" and "D," and made a part hereof, are true and complete copies of the "General Transfer (other than real estate)" and the Grant Deed by which said transfer was effected. Said transaction was a nontaxable re-organization within the meaning of the applicable provisions of the Internal Revenue Laws whereby said property, without the recognition of any gain or loss, was transferred to Rainier Brewing Company, Inc. in exchange solely for the stock or securities of Rainier Brewing Company, Inc., and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons.

III.

The statutory merger or consolidation referred to in Paragraph V (h) of the Petition and Answer was a merger of Rainier Brewing Company, Inc. and Pacific Products, Inc., dated November 1, 1937, whereby Rainier Brewing Company, Inc. was merged into Pacific Products, Inc. and its separate existence ceased; and Pacific Products, Inc. became the surviving corporation, changing its name [62] to Rainier Brewing Company. Said transaction con-

stituted a non-taxable re-organization within the meaning of the applicable provisions of the Internal Revenue Laws, wherein no gain or loss was recognized.

/s/ A. CALDER MACKAY,
ADAM Y. BENNION,
Counsel for Petitioner.

Of Counsel:

/s/ F. SANFORD SMITH,
CLIFFORD J. MacMILLAN,
O. J. SONNENBERG,
SCOTT H. DUNHAM,
/s/ J. P. WENCHEL DHN
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

EXHIBIT "A"

This Indenture, made and entered into as of the first day of October, 1925, by and between Seattle Brewing & Malting Company, a corporation organized and existing under and by virtue of the laws of West Virginia, having its principal place of business in the City and County of San Francisco, State of California, party of the first part, and Pacific Products, Inc., a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part,

Witnesseth:

In consideration of the sum of Ten Dollars ($10.00), lawful money of the United States of America, and of other good and valuable consid-

eration, receipt whereof is hereby acknowledged, the party of the first part hereby assigns, sets over and transfers unto the party of the second part, its successors and assigns, the whole of its assets of every character and description whatsoever, including its goodwill, trade name, trade mark, trade label, copyrights, and the full benefit thereof; also all of its right, title and interest in and to all real and personal property of whatsoever character and wheresoever situated.

The party of the second part hereby accepts the foregoing assignment and in consideration thereof assumes all the liabilities of the party of the first part, as shown by its books of account on the 30th day of September, 1925, not exceeding in the aggregate the sum of Twenty-nine Thousand Seven Hundred Seventy-six and 37/100 Dollars ($29,776.37)

In Witness Whereof, the parties hereto have caused these presents to be executed in their corporate names and under their corporate seals, by their officers thereunto [64] duly authorized, the day and year first hereinabove written.

SEATTLE BREWING & MALTING COMPANY,
By /s/ LOUIS HEMRICH,
President.
F. J. McCARTHY,
Secretary.
[Seal] PACIFIC PRODUCTS, INC.
By /s/ JOSEPH GOLDIE,
Vice-President.
F. S. SMITH,
Asst. Secretary. [65]

State of California,
City and County of San Francisco—ss.

On this 15th day of June, in the year one thousand nine hundred and twenty-six, before me, George D. Perry, a Court Commissioner of the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Joseph Goldie and F. S. Smith, known to me to be the Vice President and Assistant Secretary, respectively, of Pacific Products, Inc., the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed Official Seal, at my office in the City and County of San Francisco, day and year in this Certificate first above written.

(Seal) GEORGE D. PERRY,
Court Commissioner of the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco—ss.

On this 15th day of June, in the year one thousand nine hundred and twenty-six, before me, George D. Perry, a Court Commissioner of the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Louis Hemrich and F. J. Mc-

Carthy, known to me to be the President and Secretary, respectively of Seattle Brewing & Malting Company, the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this Certificate first above written.

(Seal) GEORGE D. PERRY,
Court Commissioner of the City and County of San Francisco, State of California. [66]
Dated October 1, 1945.

EXHIBIT "B"

This Indenture, made and entered into as of the first day of October, 1925, by and between Rainier Brewing Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, party of the first part, and Pacific Products, Inc., a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part,

Witnesseth:

In consideration of the sum of Ten Dollars ($10.00), lawful money of the United States of America, and of other good and valuable consideration, receipt whereof is hereby acknowledged, the party of the first part hereby assigns, sets over and transfers unto the party of the second part, its

successors and assigns, the whole of its assets of every character and description whatsoever, including its goodwill, trade name, trade mark, trade label, copyrights, and the full benefit thereof; also all of its right, title and interest in and to all real and personal property of whatsoever character and wheresoever situated.

The party of the second part hereby accepts the foregoing assignment and in consideration thereof, assumes all the liabilities of the party of the first part, as shown by its books of account on the 30th day of September, 1925, not exceeding in the aggregate the sum of Two Hundred Thousand Sixty and 46/100 Dollars ($200,060.46).

In Witness Whereof, the parties hereto have caused these presents to be executed in their corporate names and under their corporate seals, by their officers thereunto [68] duly authorized, the day and year first hereinabove written.

RAINIER BREWING COMPANY,

[Seal] /s/ By LOUIS HEMRICH,
President.

/s/ F. J. McCARTHY,
Secretary.

PACIFIC PRODUCTS, INC.,

By /s/ JOSEPH GOLDIE,
Vice-President.

/s/ F. S. SMITH,
Asst. Secretary. [69]

State of California,
City and County of San Francisco—ss.

On this 15th day of June, in the year one thousand nine hundred and twenty-six, before me, George D. Perry, a Court Commissioner of the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Louis Hemrich and F. J. McCarthy, known to me to be the President and Secretary, respectively, of Rainier Brewing Company, the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] GEORGE D. PERRY,

Court Commissioner of the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco—ss.

On this 15th day of June, in the year one thousand nine hundred and twenty-six, before me, George D. Perry, a Court Commissioner of the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, per-

sonally appeared Joseph Goldie and F. S. Smith, known to me to be the Vice President and Assistant Secretary, respectively, of Pacific Products, Inc., of the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] GEORGE D. PERRY,

Court Commissioner of the City and County of San Francisco, State of California. [70]

Dated: October 1, 1925. [71]

EXHIBIT C

General Transfer
(Other than real estate)
Pacific Products, Inc.,
to
Rainier Brewing Company, Inc.

This Indenture, dated the 11th day of October, 1932, between Pacific Products, Inc., a corporation of the State of California, (hereinafter called the Seller), party of the first part, and Rainier Brew-

ing Company, Inc., a like corporation, (hereinafter called the Buyer), party of the second part,

Witnesseth:

Whereas, the Seller is a corporation of the State of California, engaged, among other things, in the business of manufacturing and selling ale, beer, porter and other beverages and beverage products and ingredients thereof, including beverages containing what at any time may be the maximum legal alcoholic content, and of dealing in malt and hops and the products thereof, and owning and operating a brewery in the City and County of San Francisco, State of California, and owning property located in the City of Seattle, County of King, State of Washington, and having its principal office for the transaction of business in the City and County of San Francisco, State of California; and

Whereas, shareholders of the Seller holding of record at least two-thirds of the Seller's issued and outstanding shares, have consented to the sale, grant, transfer and conveyance of the Seller's business, franchises and property, real and/or personal, as a whole, save and except properties not used by the Seller in the conduct of its manufacturing business, which said properties are valued upon the Balance Sheet of the Seller prepared by Haskins & Sells, Certified Public Accountants, as of July 31, 1932, at $178,776.54 and which said properties are fully described upon Exhibit "A" hereto attached, all of which said excepted properties are herein-

after referred to and known as the "excepted properties," to the Buyer, for 50,000 Class A Common shares and 400,000 Class B Common shares of the Buyer to be issued to the Seller in the manner hereinafter provided, and the assumption by the Buyer of, and its undertaking to pay, satisfy and discharge as and when the same become payable, all debts and liabilities of the Seller existing on the 31st day of July, 1932; and

Whereas, at a special meeting of the Board of Directors of the Seller duly called and held at the office of the Seller on the 11th day of October, 1932, at which meeting a majority of said Board was present and acting, a resolution was adopted authorizing and directing the President and Secretary of the Seller, for and on its behalf and in its corporate name, to sign, seal, acknowledge and deliver to the Buyer this particular Instrument of Transfer upon the receipt from the Buyer of its agreement to issue said 50,000 Class A shares and 400,000 Class B shares of the Buyer, and the agreement of the Buyer assuming, undertaking and agreeing to pay, satisfy and discharge the debts, obligations and liabilities of the Seller existing on July 31, 1932; and

Whereas, the Buyer has delivered to the Seller, the agreement of the Buyer to issue to the Seller 50,000 Class A shares and 400,000 Class B shares of the Buyer, and the Buyer has also delivered to the Seller the agreement of the Buyer assuming, undertaking and agreeing to pay, satisfy and discharge the debts, obligations and liabilities of the Seller, as above provided, the receipt of which, at or be-

fore the [73] delivery of these presents, is hereby acknowledged by the Seller,

Now, Therefore, in consideration of the premises, the Seller has sold, assigned, transferred, set over, granted and conveyed and by these presents does sell, assign, transfer, set over, grant and convey unto the Buyer, and its successors and assigns, as of the 31st day of July, 1932, all of the Seller's business, franchises and property, as a whole, including, among other things, all personal property of whatever kind or nature which the Seller owns or in which it has any right, title or interest, including all machinery, tools, movable equipment, all stocks of materials on hand, book accounts, claims, demands and causes of action against others, good will, trade names, trade-marks, brands, patent and contract rights, cash in bank and in the Seller's office, and all fixtures, equipment, office furniture, trucks, automobiles, shares of stock of other corporations, and all other personal property connected with or used in connection with the Seller's business, and all other assets of whatsoever kind or nature and wheresoever situate, save and excepting the excepted properties which said properties are hereby retained by the Seller, and excepting the real property and real estate interests owned by the Seller which are the subject matter of separate indentures executed and delivered contemporaneously with the execution and delivery of this indenture, it being the true intent and purpose of this indenture to grant and transfer to the Buyer and its successors and assigns, all assets, of every

nature and description whatsoever and wheresoever situated, owned by the Seller or in which the Seller has any right, title or interest, and which are not conveyed to the Buyer by said indentures executed and delivered contemporaneously herewith, as aforesaid, save and excepting, however, the excepted properties, so that, by the execution and delivery of this indenture and said other indentures, the Buyer shall be vested with, and be the owner of, all of the business, franchises and property of the Seller, as a whole, save and except said excepted properties, as of the 31st day of July, 1932, as the Buyer's own absolute property. [74]

To Have And To Hold the said property and interests hereby sold, assigned, transferred, set over, granted and conveyed to and for the own proper use and behoof of the Buyer, its successors and assigns, forever.

This Indenture further witnesseth that, for the consideration aforesaid, the Seller hereby constitutes and appoints the Buyer, its successors and assigns, the true and lawful attorney or attorneys irrevocable of the Seller, with full power of substitution, for the Seller and in its name and stead, but on behalf of and for the benefit of the Buyer, its successors and assigns, to demand and receive from time to time any and all property, tangible and intangible, hereby sold, assigned, transferred, set over, granted and conveyed, or intended so to be, and to give receipts and releases for and in respect of the same or any part thereof, and from time to time to institute and prosecute in the name

of the Seller, or otherwise, but at the expense and for the benefit of the Buyer, its successors and assigns, any and all suits, actions or proceedings at law, in equity, or otherwise, which the Buyer, its successors or assigns, may deem proper, to collect, assert or enforce any claim, right or title of any kind hereby sold, assigned, transferred, set over, granted and conveyed, or intended so to be, and to defend or compromise any and all actions, suits or proceedings in respect of any of the property hereby sold, assigned, transferred, set over, granted and conveyed, or intended so to be, and to do all acts and things in relation to said property as the Buyer, its successors and assigns, shall deem desirable; the Seller hereby declaring that the foregoing powers are coupled with an interest in the Buyer, its successors and assigns, and are and shall be irrevocable by the Seller, or by its dissolution, or in any manner or for any reason. [75]

This Indenture Further Witnesseth that, for the considerations aforesaid, the Seller hereby for itself, its successors and assigns, covenants with the Buyer, its successors and assigns, that it will do, execute, acknowledge and deliver or will cause to be done, executed, acknowledged and delivered, all and very such further acts, deeds, transfers, assignments, conveyances, powers of attorney and assurances for the better assuring, conveying and confirming unto the Buyer, its successors and assigns, all and singular, the property hereby sold, assigned, transferred, set over, granted and conveyed, or in-

tended so to be, as the Buyer, its successors or assigns, shall reasonably require.

In Witness Whereof, the Seller has caused this indenture to be executed by its President and its Secretary, and its corporate seal to be hereunto affixed, the day and year first above written.

[Seal] PACIFIC PRODUCTS, INC.,
By LOUIS HEMRICH,
President.
By F. J. McCARTHY,
Secretary. [76]

State of California,
City and County of San Francisco—ss.

On this 11th day of October, in the year one thousand nine hundred and thirty-two, before me, James F. McCue, a Notary Public in and for said City and County and State, residing therein, duly commissioned and sworn, personally appeared Louis Hemrich and F. J. McCarthy, known to me to be the President and Secretary, respectively, of Pacific Products, Inc., the corporation that executed the within instrument, and they acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in the City and County and State aforesaid, the day and year in this Certificate first above written.

[Seal] /s/ JAMES F. McCUE,

Notary Public in and for the City and County of San Francisco, State of California. [77]

EXHIBIT "A"

Excepted Properties Referred to in Foregoing Instrument

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington		
Snohomish	Lot 5, Block 6, (Snohomish County) Town of Machias. Lot 6, Block 6, (Snohomish County) Town of Machias ..... (Improvements worthless)	$ 250.00
	Lot 5, Block 29, Plat of Arlington. Lot 6, Block 29, Plat of Arlington. (Building torn down)	687.06
	Sec. 4, Tp. 32, R. 6, Acres 40, the N.W. ¼ of the S.W. ¼ of, together with timber situated thereon. (Timber claim)	1,181.97
	Lot 11, Sec. 12, Tp. 32, R.N. 8 E. WM. All that portion lying North of the N.P. Ry., and between said railway as now located and the North Fork of the Stillaguamish River. (Bldg. sold for second hand lumber)..	475.00
Skagit	Sec. 20, Tp. 35, R. 11, Acres 160, (Skagit County) The SE ¼ (Timber Claim)	
	Sec. 25, Tp. 34, R. 4 Tax Lot No. 3 (Unimproved.)	1,347.83
	Lot 9, Block 1, (Skagit County) Plat of G. Rassmere Lot 10, Block 1, (Skagit County) Plat of G. Rassmere. (Unimproved)	125.00

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington		
Whatcom	Sec. 30, Tp. 40, R. 6 E. WM. Maple Falls. Com. at NE cor. of NE¼ of NE¼ of SW¼ of th. W. 33 ft. th. S. 261 ft., th. W. 90 ft., th. S. 30 ft. th. E. 90 ft. th. N. to beginning. Described as Tax Lot #15. (One story frame store building.).....	144.47
State of California		
Los Angeles	1/7th Interest in Lot 18 McDonald Tract Los Angeles, California, located near suburb of El Nido	3,314.21
King	Lot 1, Block 323, Seattle Tide Lands, (Unimproved—First Ave. and Connecticut St.)	28,885.69
"	Lot 1, Block 12, Bay View Add. to Salmon Bay Lot 2, Block 12, Bay View Add. to Salmon Bay Lot 3, Block 12, Bay View Add. to Salmon Bay Lot 4, Block 12, Bay View Add. to Salmon Bay ..... (Unimproved—Near Fort Lawton.)	21.33
"	Lot 16, 21, and 25, Tracts 16, 21, and 25 Rainier Beach Garden Tracts, as per Map recorded in Vol. 9, of Plats, Page 37, Records of King County. (Improved with one story frame bldg. Matheson & Deady Property.).....	12,935.09
"	Lot 4, Block 96, Seattle Tide Lands, J. G. Pierce Lot 5, Block 96, Seattle Tide Lands, J. G. Pierce Unimproved—Smith Cove, Puget Avenue.)	544.50

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington		
King	Lot 12, Block 4, Town of Berlin, (Improved with small shack)	50.00
"	Sec. 22, Tp. 20, R. 10, Northwest quarter of southwest quarter. (Ellis property near Green River Hot Springs)	
"	Sec. 22, Tp 20, R. 10, Southwest quarter of southwest quarter. (Ellis property near Green River Hot Springs)	1,200.00
Clallam	Lot 3 and the East half of the SW. quarter (Timber claim) Lot 4, Sec. 7, Tp. 30, R. 8 W. Acres 160, (Clallam County) And the East half of the SW. quarter. (Timber claim)	1,000.00
Chelan	Lot 3, Block 4, (Chelan County) Town of Leavenworth (Improvements condemned)	6,133.42
"	Lot 9, Block 1, Ralston's Add. to Town of Leavenworth. (Unimproved)	250.00
Island	Sec. 10, Tp. 29, R. N. 3 E. Acres 40, (Island County) The NW ¼ of the SE. ¼ excepting therefrom the N. ½ of the NE. ¼ of the NW. ¼ of the SE. ¼ of Sec. 10, Tp. 29, N.R. 3 E. WM. containing 5 acres (cleared land)	2,507.00
Kitsap	Lot 12, Block 11, (Kitsap County) Town of Bremerton (Improved Brick bldg.—1 story)	7,989.79
Mason	Sec. 8, Tp. 21, R.N. 3 W., Acres 25 (Mason County) W. ½ and S. ½ of W. ½ of E. ½ of NW. ¼ of NE. ¼	500.00
King	Tract 9, (Matheson & Deady) of Sturtevant's Rainier Beach Valley Tracts to King County (small shack)	1,551.18

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington		
King	Lot 7, Block 3, Hillman City Division 3	
	Lot 8, Block 3, Hillman City Division 3	488.88
"	Lot 13, Block 7, Kinnear's First Rainier Beach Addition	
	Lot 14, Block 7, Kinnear's First Rainier Beach Addition (unimproved)	1.00
"	Sec. 31, Tp. 26, N. 4 E., WM. 2½ acres (Caswell Green Lakes) acreage S. ½ of S. ½ of SE. ¼ of SE. ¼ of, approximately 2½ acres, excepting a strip 30 ft. wide off the E. margin for a road, and a strip 30 ft. wide off the W. margin for a road.	
	(3 room frame bldg.)	2,300.00
"	Lot 14, Block 108, Gilman Park Addition to Seattle,	
	Lot 15, Block 108, Gilman Park Addition to Seattle,	
	Lot 16, Block 108, Gilman Park Addition to Seattle,	
	Lot 17, Block 108, Gilman Park Addition to Seattle.	
	(Unimproved)	
	Lot 1, Block 13, Gilman Park Add. to Seattle	
	Lot 2, Block 13, Gilman Park Add. to Seattle	
	Lot 22, Block 13, Gilman Park Add. to Seattle	
	Lot 23, Block 13, Gilman Park Add. to Seattle	
	Lot 24, Block 13, Gilman Park Add. to Seattle	
	(Improved with Brewery, Bottling Works, Stable, etc.)	12,751.08
"	Lot 5, Block 20, Anderson's Addition to Pontius (Frame garage bldg. with brick floor)	5,250.00

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington		
King	Lot 35, Block 4, Ballard Addition to Seattle, Lot 36, Block 4, Ballard Addition to Seattle 826 W North 63rd Street (6-room frame dwelling)	2,095.48
"	Lot 19, Block 13, F. F. Day's First Addition Lot 5, Block 8, F. F. Day's First Addition (Unimproved)	800.00
"	Lot 11, Block 13, Hills Tract, S. 112 Feet Lot 12, Block 13, Hills Tract, S. 112 Feet 1600-1602 Main Street (frame duplex house)	6,092.73
"	Lot 4, Block 22, First Plat of West Seattle by W. S. Land & Improvement Company (unimproved)	777.56
"	Lot 45, Block A; C. D. Hillman's Garden of Eden Addition to Seattle Lot 46, Block A. Div. 1. Kennydale. (Frame hotel bldg. & store)	962.00
"	Lot 12, Block 7, 323 West Mercer Street, No. 10 ft. of, Lot 13, Block 7, all of. Lot 14, Block 7, re-plat of Blks. 1, 2, 6, 7, 13, 14 and 23 of N. Seattle (2 story 8-room frame bldg. & 1-story 5-room bldg.)	6,589.70
"	Lot 14, Block 2, Clairmont Addition Lot 15, Block 2, Clairmont Addition (Unimproved)	500.00

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington		
King	Lot 1, Block 60, Maynard's Lake Washington Add. Lot 2, Block 60, Maynard's Lake Washington Add. Lot 11, Block 60, Maynard's Lake Washington Add. Lot 12, Block 60, Maynard's Lake Washington Add. (Unimproved)	1.00
"	Lot 37—Block 402 Seattle Tide Lands	3,532.92
"	Lot 1—Sprague's Addition, except portion conveyed to Puget Sound Railway, April 6, 1906	7,970.97
Benton	Kennedy's 1st Add'n. Town of Kiona, Wash. Lots 12, 13, 5, Block 5	75.00
Province of Canada		
Saskatchewan	N ½ of Sec. 21—TWP 33, R5W of (320 acres) 2nd M	
Province of Alberta	Prairie lands—The NE ¼ of Sec. 35 TWP 52 R 3 W 5 M (160 acres) being part of Wabamum Indian Reserve	10,395.30
" " "	The SE ¼ of Sec. 21—TWP 53—R 19 W 4 M (160 acres) (prairie lands).	
State of Washington		
Stevens	The NE ¼ of Sec. 15 in TWP 29 NR 36 E W M Farm Lands containing 160 acres more or less	2,000.00
State of Montana		
Powell	Storage Bldg. Original townsite of Deer Lodge, Lot 1, Block 9	1,800.00
State of Washington		
Douglas	1-story brick building, original Gov't. Townsite of Waterville Lot 1, Block 8	1,500.00
	2nd Addition to Waterville Lots 6 to 10 Blk. 28	938.72

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington		
Benton	Bldg. used as Blacksmith shop N. 114 ft. of N.P. Irrigation Co.'s 1st add'n. to Kennewich measured along the west side of said lot—Lot 12, Block 2	1,500.00
Whatcom	York addition to City of New Whatcom (now Bellingham) Lot 10, Block 18	350.00
Adams	The SW ½ front and rear of original Town of Ritzville, Lot 8, Block 10	500.00
Whatcom	Old Stg. Bldg. Good only for Lbr. Johnson's add'n. to Sumas Lot 6, Block 1	1,489.15
Lincoln	Beer Stg. Whse. SE add'n. to Town of Davenport excepting coal shed now located on premises. N 50 ft. sold March 19, 1908 for $75.00. Co. now owns So. 50 ft. Lot 10, Block 16	650.00
Yakima	N ½ of NW ¼ and W ½ of SW ¼ of Sec. 34 TWP 13 N R 20 E W M 16 acres	2,755.73
State of Arizona		
Yavapai	Frame Stge. Bldg. Moeller add'n. to City of Prescott. Lot 21, Block 13	2,000.00
State of Washington		
Jefferson	Irondale, Lot 55, Block 46 (Bldg. sold off this property)	1.00
Kitsap	Manchester Heights—Unimproved (replat of) Lot 1, Block 16	20.00
"	Dane Acreage N.W. ¼ of SW ¼ and approx. 63½ acres (shack) Lot 3, Sec. TP. R. Acres 17 24 N1. E WM 63½	4,000.00
Yakima	E. ½ of the NE ¼ of the NE ¼ of Sec. 9, Tp. 14 R. 19 E Acres—WM 20 Unimproved	40.00

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington Kittitas	Brick Bldg. All that portion of original town of Ellinsburg, com. at a pt. 30 ft. So. of N.W. corner of Lot 4 running thence East 120 ft. parallel with the N. line of said lot 4 thence So. 30 ft. thence W. 24 ft. thence So. 60 ft. thence W. 48 ft. thence N 66 ft. thence W. 48 ft. thence N. 24 ft. to place of beginning. Lots 4, 5, Block 15	8,757.82
State of California San Joaquin	City of Stockton. The E 15 ft. of the W 40 ft. of Lot 4, Blk. 253 and the E 10 ft. of Lot 4, Blk. 253 and the W 40 ft. of Lot 6, Blk. 253 East of Center Street, according to the official Map or plat in the City of Stockon.	11,371.92
State of Washington King	Lots 8 to 22, inclusive, Block 2 That portion of lots 8 to 22 both incl. and that portion of the alley vacated by Ord. 410 within the boundaries of said lots Blk. 2, Carsten's Add. to City of Georgetown (now Seattle) that lies E. of the 10 ft. strip of said blk. deeded to Georgetown by the O & W Ry. for the widening of Charleston St. now Corson Ave. containing 0.93 acres, more or less. Excepting therefrom a strip of land 45 ft. in width, the center line of which is described as follows: Beg. at a pt. on the S. line of Norton St. now Vale St., 31.15 ft. Wstly from the NE cor. of Lot 2, Blk. 1 subdivision of Julius Horton tracts Nos. 13 and 14, Georgetown; th. NWstly 1075 ft. more or less to pt. on the W. line of Charleston St. now Corson Ave., Situated 32.47 ft. Nthly from the S.E. Cor. of Lot 14, Blk. 7, King County Add. to Seattle. (Garage and magnesia pipe covering	

State and County where located	Description of Property	Valuation upon July 31, 1932, Balance Sheet, Pacific Products, Inc.
State of Washington		
King	Lot 9, Blk. 17, Tp. 24, R. 4 Beg. at pt. 90 ft. SE of N.W. Cor. of Lot 9 of the tracts of Julius Horton for true pl. of beg. th. 161 ft. NEstly to NE boundary line of said lot, the. SE along said boundary line, 30 ft. th. SW. 161 ft. to the County Road; the. NW 30 ft. to pl. of beg. Also a tract of land described as follows: Beg. at a pt. 120 ft. SE of NW cor. of lot 9 of plat of Tracts of Julius Horton, and along the line of said lot to true pl. of beg.; the NE 160 ft. to E. boundary line of said lot; th. SE 30 ft. along E. Boundary line of said lot; th. SW 160 ft. to W. boundary line of said lot; th. NW 30 ft. to pl. of beg. (California Cotton Mills Location).....	7,003.34
Skagit	Tax lot #3 Section 25 Township 34—R 4 E W M 0.11 Acres	25.00
	Total	$178,776.54

EXHIBIT D

This Indenture, made the eleventh day of October in the year one thousand nine hundred and thirty-two, between Pacific Products, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal office for the transaction of business in the City and County of San Francisco, State of California, the party of the first part, and Rainier

Brewing Company, Inc., a like corporation, having its principal office for the transaction of business in the City and County of San Francisco, State of California, the party of the second part,

Witnesseth:

That the party of the first part, in consideration of the sum of ten ($10.00) dollars lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain and sell unto the said party of the second part, its successors and assigns, forever, all those certain lots, pieces or parcels of land bounded and described as follows, to-wit:

All that certain lot, piece or parcel of land situate in the City and County of San Francisco, State of California, described as follows, to-wit:

Beginning at the point of intersection of the westerly line of Bryant Street with the southerly line of Alameda Street and running thence southerly along the westerly line of Bryant Street 324'-9" to a point distant 73'-3" northerly from the northerly line of 15th Street, and running thence westerly 204'-6" to a point on the easterly line of Florida Street, distant northerly thereon 118'-0" from the northerly line of 15th Street, and running thence northerly along the easterly line of Florida Street 282'-0" to the southerly line of Alameda Street

and running thence easterly [84] along the southerly line of Alameda Street 200′-0″ to the point of beginning;

Being a portion of Potrero Block 24.

Also,

All the following described property situate in the City of Seattle, County of King, State of Washington:

A tract of land comprising portions of tracts 8 and 9 of the Julius Horton tracts recorded in Vol. 3 of Plats, page 171, records of King County, Washington, also an unplatted tract of land situated in the L. M. Collins Donation Claim lying between the easterly line of said tract 8 of the Julius Horton tracts and the northerly line of former Nora Street in Sprague's Addition to the City of Seattle as recorded in Vol. 7 of Plats, page 49, records of King County, Washington, also portion of vacated Nora Street as vacated by Ordinance No. 78, City of Georgetown, also portion of Block 1, Sprague's Addition, and vacated alley in said block, also vacated portion of Juneau Street as vacated by Ordinance No. 35490, City of Seattle, the boundaries of said tract of land are more particularly described as follows:

Commencing at the monument marking the intersection of the west line of the said Julius Horton Tracts and the center line of Duwamish Avenue; thence S. 34° 23′ 39″ E. along said

center line 187.95 feet; thence N. 55° 36′ 21″ E. 30 feet to the easterly margin of Duwamish Avenue and the true place of beginning; thence S. 34° 23′ 39″ E. along said easterly margin 1449.08 feet; thence continuing along the northerly margin of Duwamish Avenue, S. 66° 47′ 45″ E. 38.19 feet; thence S. 70° 45′ 34″ E. 44.91 feet to the northwesterly margin of the unvacated portion of Juneau Street, as the same is set forth in Ordinance No. 35490 of Seattle; thence N. 53° 41′ 06″ E. 123.86 feet along said Juneau Street margin; thence S. 80° 22′ 34″ E. 33.58 feet along the northerly margin of Juneau Street; thence N. 53° 41′ 06″ E. 7.18 feet along said margin of Juneau Street; thence N. 36° 18′ 54″ W. 1472.41 feet to point of curve; thence to the right on a curve of 5977.22 feet radius 64.85 feet; thence S. 55° 36′ 21″ W. 151.00 feet to the place of beginning.

Together with the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. [85]

To Have And To Hold the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns, forever.

In Witness Whereof, the party of the first part has hereunto signed its named and affixed its cor-

porate seal, by its officers thereunto duly authorized, the day and year first hereinabove written.

[Seal] PACIFIC PRODUCTS, INC.,

By /s/ LOUIS HEMRICH,
President.

By /s/ F. J. McCARTHY,
Secretary.

(U. S. Internal Revenue Stamps in the amount of $1009.00 were affixed to the original of this instrument and canceled as of the 11th day of October, 1932.) [86]

State of California,
City and County of San Francisco—ss.

On this 11th day of October, in the year one thousand nine hundred and thirty-two, before me, James F. McCue, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Louis Hemrich and F. J. McCarthy, known to me to be the President and Secretary, respectively, of Pacific Products, Inc., the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in

the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] /s/ JAMES F. McCUE,
Notary Public in and for the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco—ss.

On this 11th day of October, in the year one thousand nine hundred and thirty-two, before me personally appeared Louis Hemrich and F. J. McCarthy, to me known to be the President and Secretary, respectively, of Pacific Products, Inc., the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ M. V. COLLINS,
Commissioner of Deeds for the State of Washington with offices at 433 California Street, San Francisco, California.

Filed July 19, 1945. [87]

[Title of Tax Court and Cause.]

STIPULATION II

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel:

That during the period from July 1, 1935 to and including June 30, 1940, Seattle Brewing & Malting Co. (formerly Century Brewing Association) sold in the State of Washington and the Territory of Alaska the following quantities of beer, ale and other alcoholic malt products under the name "Rainier" and paid as royalties thereon the following amounts:

Year Ending June 30th	Royalties	Barrels
1936	$ 75,000	60,171
1937	75,000	82,881
1938	85,731.12	114,308.16
1939	84,403.63	112,538.14
1940	98,834.47	131,355.89
Total	$418,969.22	501,253.89

/s/ A. CALDER MACKAY,
/s/ ADAM Y. BENNION,
Counsel for Petitioner

Of Counsel:

/s/ F. SANFORD SMITH,
/s/ CLIFFORD J. MacMILLAN,
/s/ O. J. SONNENBERG,
/s/ SCOTT H. DUNHAM.
/s/ J. P. WENCHEL BHN
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

Filed July 19, 1945. [89]

[Title of Tax Court and Cause.]

STIPULATION III

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that—

I.

Petitioner's predecessors, Seattle Brewing and Malting Co. (the West Virginia corporation) and Rainier Brewing Company (the Washington corporation) filed income tax returns for the years 1918, 1919 and 1920, but claimed no deductions therein for obsolescence of good will or trade names.

II.

In July, 1920, Seattle Brewing and Malting Co. (the West Virginia corporation) filed a claim for abatement of taxes for the year 1919, a photostatic copy of which is attached hereto, marked Exhibit I and made a part hereof.

III.

The Commissioner of Internal Revenue thereafter, in 1924, in lieu of the amount of $542,240.27 stated in Schedules E and F of Exhibit I attached hereto, computed an amount of $406,680.20, which was arrived at by using the same figures as those used in Exhibit I attached hereto, but changing the capitalization rate from 15 per cent, as used in Exhibit I, to 20 per cent. [90]

Method Used in Valuing Good Will

The only basis for establishing a rate of capitalizing the good will value of the company is given in Bulletin 10-20-777-ARM 34- of Income Tax Rulings, wherein it is provided that earnings for tangible and intangible assets should be taken over a period of [92] not less than five years prior to March 1, 1913. As indicated in schedules attached, the earnings of this Corporation have been taken from the inception of the business, 1903 to March 1, 1913. It is believed that this longer period truely reflects the earning capacity and invested capital of the business on which to base normal and excess over normal earnings for the purpose of establishing good will.

In preparing this claim the normal earnings have established at ten per cent of the average invested capital prior to March 1, 1913 and the excess of actual earnings over this amount capitalized at 15 per cent to establish good will loss.

The claimant contends that the business conducted is not of a hazardous nature, and is entitled to the lowest possible rate for a basis of capitalization of its intangibles.

The schedules submitted show a substantial business throughout the entire period of its existence and the above method applied does not produce a result that compensates for the actual loss sustained.

Its loss is irreparable and the amount here asked is very small for the great loss of an established industry.

Schedules in Support of Claim

1. Schedule "A" Balance Sheets.

2. Schedule "B" Summary (Capital, operations, surplus)

3. Schedule "C" Analysis operating expenses.

4. Schedule "D" Analysis surplus 6-30-13 to 12-31-19.

5. Schedule "E" Computation of good will loss.

6. Schedule "F" Application of good will loss to taxes assessed.

Respectfully submitted. [93]

ETS

6 8	7 1909
50.06	2054831
42.54	348585
03.10	124113
72.73	67866
19.36	508844
80.17	868243
85.00	311120
23.81	14580
76.77	4298185
37.09	68967
00.00	222700
47.37	25842
85.00	311120
40.80	9353
83.39	210513
96.06	57230
00.00	2000000
87.06	1392458
76.77	4298185

SCHEDULE "A"—BALANCE SHEETS

(Fiscal Year ending June 30th)

Assets	1 1903	2 1904	3 1905	4 1906	5 1907	6 1908	7 1909	8 1910	9 1911	10 1912	11 1913
Const. & Property	1367213.76	1456212.21	1584584.41	1679821.75	1911722.07	2034350.06	2054831.60	2125021.28	2221883.35	2306552.39	2157882.16
Equipment	186425.35	223051.27	210191.82	213487.03	314587.96	339942.54	348585.40	322917.14	315962.89	316263.31	307836.34
Investments	36159.54	16981.46	12233.35	22322.21	24352.29	71403.10	124113.38	129652.79	111500.63	106865.75	105237.72
Cash	9579.11	19952.15	38892.70	34719.72	36721.74	11272.73	67866.07	29710.44	77451.68	69686.13	61362.15
Material & Supplies	234966.50	288004.54	318986.36	314200.55	445769.97	515719.36	508844.60	477654.24	53,9692.08	677860.43	746064.66
Accounts Receivable	606011.53	667493.24	585312.87	651792.35	792932.47	738880.17	868243.59	934643.71	1002358.63	1144618.19	1154799.94
Accommodation Notes	77758.74	91571.70	84047.70	177125.00	168726.01	203285.00	311120.00	205470.00	227994.30	154590.00	158384.00
Prepaid Expenses	8098.01	10169.83	8559.51	19335.42	16146.58	15423.81	14580.84	14984.38	16016.01	14337.74	5202.33
Total	2526212.54	2773436.40	2842808.72	3112804.03	3710959.09	3930276.77	4298185.48	4240053.98	4512859.57	4790773.94	4696769.30
Liabilities											
Audited Vouchers	83420.27	83945.83	78101.53	84143.55	189961.63	68437.09	68967.78	60980.05	65776.23	122714.76	90546.22
Notes Payable	263000.00	286500.00	239000.00	166700.00	292200.00	322200.00	222700.00	79000.00	.....	57500.00	156500.00
Accounts Payable	14790.85	6062.19	5760.93	3702.90	14632.78	18247.37	25842.10	26938.60	87460.80	37148.49	33420.00
Accommodation Notes	77758.74	91571.70	84047.70	177125.00	168726.01	203285.00	311120.00	205470.00	227994.30	154590.00	158384.00
Accrued Expense	6304.71	7976.52	3856.80	6933.55	7635.66	6340.80	9353.74	5229.52	6301.94	7202.60	17672.52
Depreciation Reserve	113432.53	139245.80	150000.00	176097.60	191442.57	190383.39	210513.44	243301.24	284087.97	319230.95	357654.55
Bad Debts Reserve	12269.83	10521.04	5000.00	4873.28	35957.10	48206.06	57230.32	45266.90	38059.87	49435.60	31424.22
Capital Stock	1000000.00	1000000.00	1000000.00	1000000.00	1000000.00	2000000.00	2000000.00	2000000.00	2000000.00	2000000.00	3000000.00
Surplus	955235.61	1147613.32	1277041.76	1498328.15	1810403.04	1073087.06	1392458.10	1573867.67	1803178.46	2042951.54	851167.79
Total Liabilities and Capital	2526212.54	2773436.40	2842808.72	3112804.03	3710959.09	3930276.77	4298185.48	4240053.98	4512859.57	4790773.94	4696769.30

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SCHEDULE "B"

Summary operating and surplus analysis

(Fiscal year ending June 30th)

	1 1903	2 1904	3 1905	4 1906	5 1907	6 1908	7 1909	8 1910	9 1911	10 1912	11 1913	12 $/12 of 1913	13 Average
1. Inventory 1st of Yr.	285834.46	234966.50	288004.54	318986.36	314200.55	445769.97	515719.36	508844.60	477654.24	539692.08	677860.43		
2. Purchases	262727.07	232058.11	200110.71	204499.42	440597.58	252518.49	173721.27	349904.49	500233.78	521467.80	648092.12		
3. Total	548561.53	467024.61	488115.25	523485.78	754798.13	698288.46	689440.63	858749.09	977888.02	1061159.88	1325952.55		
4. Inventory End of Yr.	234966.50	288004.54	318986.36	314200.55	445769.97	515719.36	508844.60	477654.24	539692.08	677860.43	746064.66		
5. Cost goods sold	783528.03	755029.15	807101.61	837686.33	1200568.10	1214007.82	1198285.23	1336403.33	1517580.10	1739020.31	2072017.21		
6. Gross Sales	1447043.68	1430253.50	1442917.37	1493190.53	2164916.95	2169373.18	2091570.58	2321822.35	2596459.83	2873603.62	3213130.07		
7. Gross Profits	663515.65	675224.35	635815.76	655504.20	964348.85	955345.36	893285.35	985419.02	1078879.73	1134583.31	1141112.86		
8. Other Income	20847.38	.....	.....	58784.97	3093.55	13312.54	112672.78	15165.33	66166.23	19586.19	24700.07		
9. Gross Income	684363.03	675224.35	635815.76	714289.17	967442.40	968657.90	1005958.13	1000584.35	1145045.96	1154169.50	1165812.93		
10. Expenses	307317.02	407732.26	376955.01	375312.30	485602.28	544133.21	513167.02	583052.43	607994.67	604863.99	633611.14		
11. Advertising	47305.92	40361.75	44194.74	57690.48	79765.23	62110.67	53420.07	61122.35	67740.50	69532.43	95244.73		
12. Total	354622.94	448094.01	421139.95	433002.78	565367.51	606243.88	566587.09	644174.78	675735.17	674396.42	728855.87		
13. Net Income	329740.09	227130.34	214675.81	281286.39	402074.89	362413.02	439371.04	356409.57	469310.79	479773.08	436957.06	291304.71	361524.44
14. Inv. Capital 1st Yr.	1685495.52	1955235.61	2122365.95	2277041.76	2498328.15	2810403.04	3073087.06	3392458.10	3573867.67	3803178.46	4042951.54	2695301.03	2801884.00
15. Total	2015235.61	2182365.95	2337041.76	2558328.15	2900403.04	3175587.06	3512458.10	3748867.67	4043178.46	4282951.54	4479908.60		
16. Dividends Paid	60000.00	60000.00	60000.00	60000.00	90000.00	102500.00	120000.00	175000.00	240000.00	240000.00	628740.81		
17. Inv. Cap. End Yr.	1955235.61	2122365.95	2277041.76	2498328.15	2810403.04	3072387.06	3392458.10	3573867.67	3803178.46	4042951.54	3851167.79		

7 1909	8 1910	9 191
60840.64	163359.37	200513
76168.83	75936.61	84920
70762.81	109566.88	115976
38401.52	75098.49	60714
8006.21	.....	.....
.....	.....	.....
11718.25	11777.99	12078
36000.00	36000.00	36000
.....	1468.30	1972
77598.96	94353.78	79248
13669.80	12440.97	12536
.....	3050.04	4032
583167.02	583052.43	607994
63420.07	61122.35	67740
646587.09	644174.78	675735

SCHEDULE "C"

Analysis of operating expenses

	1 1903	2 1904	3 1905	4 1906	5 1907	6 1908	7 1909	8 1910	9 1911	10 1912	11 1913
1. Wages	121262.40	136081.85	130316.55	139446.03	205898.12	171639.84	160840.64	163359.37	200513.78	236510.42	253026.90
2. Salaries	30646.26	32010.02	36859.80	40531.55	46966.56	64076.64	76168.83	75936.61	84920.45	84391.66	89698.69
3. General Office	32690.89	34596.66	32987.19	57987.13	67454.86	76553.04	70762.81	109566.88	115976.73	102280.11	116435.19
4. Other Expenses	31717.23	34905.62	37482.63	28048.94	55487.68	98729.79	88401.52	75098.49	60714.55	24076.28	29774.01
5. Interest	12841.30	18538.74	17760.88	13861.34	9815.59	19144.17	8006.21	.....	.....	.....	.....
6. Rentals	391.23	1058.34	6901.98	7480.38	.....	.....	.....	.....	.....	4798.73	.....
7. Insurance	15438.36	15843.20	13734.78	14539.14	13405.62	11810.24	11718.25	11777.99	12078.98	11112.18	12248.36
8. Bad Debts	11000.00	85794.46	52974.27	24000.00	33000.00	36000.00	36000.00	36000.00	36000.00	36000.00	36000.00
9. Repairs	8662.05	5795.67	932.25	1376.30	.....	578.34	.....	1468.30	1972.21	6485.06	.....
10. Depreciation	34988.98	32632.38	35598.96	35598.96	44598.96	47598.96	47598.96	94353.78	79248.84	79728.84	79728.84
11. Taxes	7678.32	10478.32	11395.62	12442.53	8974.89	15232.19	13669.80	12440.97	12536.58	14879.39	12701.11
12. Income Taxes	.....	.....	.....	.....	.....	.....	.....	3050.04	4032.55	4601.32	3998.04
13. Sub-Total	307317.02	407732.26	376945.21	375312.30	485602.28	541363.21	513167.02	583052.43	607994.67	604863.99	633611.14
14. Advertising	47305.92	40361.75	44194.74	57690.48	79765.23	62110.67	53420.07	61122.35	67740.50	69532.43	95244.73
15. Total	354622.94	448094.01	421139.95	433002.78	565367.51	603473.88	566587.09	644174.78	675735.17	674396.42	728855.87

SCHEDULE "D"

(Analysis of surplus June 30, 1913 to December 31, 1919)

June 30, 1913, Surplus		851,167.79
Earning June 30, 1913 to June 30, 1914		659,965.66
		1,511,133.45
Less Dividends Paid		300,000.00
June 30, 1914 Surplus		1,211,133.45
Earning June 30, 1914 to June 30, 1915		556,077.56
		1,767,211.01
Less Dividends Paid		300,000.00
June 30, 1915 Surplus		1,467,211.01
Earning June 30, 1915 to June 30, 1916		154,611.67
		1,621,822.68
Less Dividends Paid	180,000.00	
Less Plant Obsolescence	900,474.20	1,080,474.20
		541,348.48
Earnings June 30, 1916 to June 30, 1917		97,485.85
		638,834.33
Less Dividends Paid		180,000.00
June 30, 1917 Surplus		458,834.33
Earnings June 30, 1917 to June 30, 1918		108,664.39
		567,498.72
Less Dividends Paid		180,000.00
		387,498.72
Earnings June 30, 1918 to June 30, 1919		248,525.65
		636,024.37
Less Dividends Paid		180,000.00
		456,024.37
Earnings June 30 to December 31, 1919		53,405.47
December 31, 1919 Surplus		$ 509,429.84

[97]

SCHEDULE "E"

(Computation of Good Will Loss)

Average capital invested prior to March 1, 1913 (Schedule B, Line 14, Column 13)			$2,801,884.00
Average Earnings prior to March 1, 1913. (Schedule B, Line 13, Column 13)	$361,524.44		
Average normal earning of invested capital prior to March 1, 1913 @ 10%	$280,188.40		
Average Good Will earnings prior to March 1, 1913	$ 81,336.04		
Average yearly earnings of Good Will prior to March 1, 1913 capitalized @ 15%		$542,240.27	
Net profits for year 1918	None		
Normal earnings of year 1918 ($4,160,575.64 @ 10%)	$416,057.64		
The present value of earnings attributable to good will January 31, 1918	None		
Computable value of Good Will loss applicable to 1919 and future income		$542,240.27	

SCHEDULE "F"

(Application of Good Will loss to taxes assessed.)

Computable value of Good Will loss (Schedule "E")		$542,240.27
Net taxable income as per return of income for year 1919	$174,188.84	
Amount of Good Will loss applied to above income	$174,188.84	
Amount of taxes assessed on above income	$16,725.28	
Amount asked to be abated as per claim in abatement filed herewith (Form 47) (Temporary claim in abatement filed May 15, 1920 is hereby cancelled)	$16,725.28	
Remaining balance of Good Will loss		$368,051.33

Filed July 19, 1945.

Before the Tax Court of the United States

Docket No. 4895

In the Matter of:

RAINIER BREWING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

July 19, 1945—10:15 A.M.

Before: Honorable Marian J. Harron, Judge.

Appearances:

A. Calder Mackay, Esq., 728 Pacific Mutual Building, Los Angeles, California, appearing on behalf of Rainier Brewing Company, Petitioner.

Adam Y. Bennion, Esq., 728 Pacific Mutual Building, Los Angeles, California, appearing on behalf of Rainier Brewing Company, Petitioner.

F. Sanford Smith, Esq., 705 Standard Oil Building, San Francisco, California, appearing on behalf of Rainier Brewing Company, Petitioner. [103]

Clifford J. MacMillan, Esq., 705 Standard Oil Building, San Francisco, California, appearing on behalf of Rainier Brewing Company, Petitioner.

O. J. Sonnenberg, Esq., Crocker Building, San Francisco, California, appearing on behalf of Rainier Brewing Company, Petitioner.

Scott H. Dunham, Esq., Crocker Building, San Francisco, California, appearing on behalf of Rainier Brewing Company, Petitioner.

B. H. Neblett, Esq., (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent. [104]

PROCEEDINGS

The Clerk: Docket No. 4895, Rainier Brewing Company.

Will you state your appearances for the record, please?

Mr. Mackay: A Calder Mackay, Adam Y. Bennion, F. Sanford Smith, Clifford J. MacMillan, O. J. Sonnenberg and Scott H. Dunham for Petitioner.

Mr. Neblett: B. H. Neblett, appearing for the Respondent.

The Court: Mr. Mackay, will you make your statement?

Are you going to present the whole case yourself?

Mr. Mackay: Yes.

The Court: You have a distinguished array of associates.

Opening Statement on Behalf of the Petitioner

By Mr. Mackay:

Mr. Mackay: If your Honor please, the taxable years involved in the appeal in this case are the calendar years 1940 and 1941.

The Petitioner has decided to abandon the issue in 1941, which has to do with the abandonment loss of some neon signs.

For the year 1940, substantial taxes are involved, [105] namely, approximately $235,000 in income taxes, declared value excess profits taxes in the round figure of $18,000, and excess profits tax of approximately $286,000, or a total for the year 1940 of approximately $539,000.

All substantial taxes for 1940, except a small amount of excess profits tax, are attributable to the determination by the Commissioner that promissory notes in the amount of $1,000,000 received by the taxpayer during the year 1940 constituted taxable ordinary income.

The Petitioner challenges this determination, principally on the ground that the $1,000,000 in notes constitutes a return of capital rather than ordinary income. The taxpayer takes the position that the notes were the proceeds from the sale of a capital asset having a basis of $1,000,000, so that no gain was realized therefrom.

We have some alternative grounds, however, if your Honor please. If the Court should hold that the transaction which I shall presently describe did not constitute a sale, the taxpayer contends that nevertheless the $1,000,000 notes constitute a recovery of capital and should be applied against and reduce the basis of the property in question.

The taxpayer relies upon another alternative ground, demonstrating that the Commissioner's determination was erroneous, but before stating that I

think I ought to outline the facts that we rely upon. [106]

The Petitioner, Rainier Brewing Company, is a successor corporation of a company which began in 1893 to manufacture and sell alcoholic malt beverages under the trade name "Rainier."

I might state that there have been several reorganizations of the company since that time. These reorganizations, of course, are significant only because Petitioner's basis, what we contend it sold in 1940, is the March 1, 1913 value.

I might state for your Honor that we have a stipulation regarding various reorganizations which will show that they are tax free reorganizations. So that, I think if we do determine it to be a sale, we will establish that fact as a cost.

In order that there shall be no confusion, however, resulting from the change in names through these reorganizations, we have prepared a chart of the corporate history, and we should like to submit this to your Honor, because there may be a little confusion.

Your Honor will note it was the original company that was known as the Seattle Brewing and Malting Company that was organized in 1893 and incorporated until about 1903. That was a Washington corporation. At that time there was a West Virginia corporation organized by the same name, but just a little different in spelling. The latter company carried on the business, then from 1903 until 1925, when all the business was transferred to a California corporation known as the Pacific Products, Inc., which was organized for that purpose. The business

was thereafter transferred to Rainier Brewing Company, organized in California in 1932, which latter company merged into Pacific Products, Inc., in 1937, to form the present taxpayer, under the name of "Rainier Brewing Company."

But, as I have stated, beginning in 1893, beer, ale and other alcoholic malt beverages were manufactured by the predecessor in Seattle, Washington, and prior to 1913 were distributed principally in the State of Washington, in fact, if your Honor please, is submitted in the pleadings. There were also some products shipped to points outside of the State of Washington.

The evidence in short, your Honor please, is that the business was eminently successful, and advertising created a great demand for the beer known as "Rainier beer."

As I have stated, Petitioner contends that a very substantial value was built up for the name "Rainier" at March 1, 1913, and we contend that that is at least $1,000,000.

In 1935 a contract was entered into between Rainier and a competitor known as the Century Brewing Company. The contract recited that Rainier was the owner of a brewing plant in Seattle, of the trade names "Rainier" and "Tacoma," [108] and that "said names are well and favorably known." The contract is rather lengthy, but the gist of it was that Rainier sold to Century for specified considerations its Seattle plant, together with beer on hand and miscellaneous equipment, and Rainier withdrew from the sale of its alcoholic malt prod-

ucts in the State of Washington and the Territory of Alaska. By the terms of the contract, Rainier granted to Century the sole and exclusive perpetual right and license to manufacture and market beer, ale and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade names of "Rainier" and "Tacoma," according to the formulas they passed along with the names.

The contract also provided that Century, for the right and license that it granted, would pay Rainier a royalty of seventy-five cents per barrel up to 125,000 barrels annually, and thereafter eighty cents per barrel for all products sold in the names of the territory designated, with a minimum annual payment, however, of $75,000.

If your Honor please, the parties, the evidence will show, operated under this agreement from 1935 to 1940, and that royalties were paid by Century to Rainier, and the contract also provided (I refer particularly to paragraph 13) that after it had been in effect for five years, Century should have the option of electing to terminate all royalties thereafter payable under the contract by delivering to Rainier [109] five promissory notes aggregating $1,000,000.

On July 1, 1940, Century exercised that option and delivered to Rainier $1,000,000 in notes, which we have stated the Commissioner treated as ordinary income, and, we are contending, were the proceeds of sale.

Your Honor please, there are many provisions in the contract which have a bearing on this inter-

pretation. The Commissioner apparently takes the view that the $1,000,000, since the contract speaks of terminating royalties, constitutes in effect a prepayment of royalties. The taxpayer maintains, however, upon the authority of Parke-Davis & Co., 31 BTA 421, and other bases, and also by reason of the nature of the trade name, that there was for all practical purposes a sale in 1940 by Rainier of its trade name, "Rainier," in the State of Washington and Territory of Alaska.

The evidence will show that although this contract covers the trade name "Rainier" and "Tacoma," that in effect "Tacoma" was of very minor significance. Very few sales were made by the taxpayer under that name prior to 1935, and it is admitted in the pleadings that after that there were no sales made at all by the acquiring company, Century.

We think, if your Honor please, that this petitioner's position that the trade name and good will associated were sold in 1940 is confirmed by many provisions of the contract. I will just take a minute to indicate some of those [110] provisions.

For example, Century was required to give Rainier a mortgage on the property, on the brewing plant, to secure the performance of Century's obligation under the contract, or, if it should sell the plant, it was required to impound at least $250,000 proceeds as security.

This evidence will show also that this mortgage was satisfied, and that the present relationship was released when the notes were finally paid.

Also, there is another provision, that prior to the

exercise of the option, the royalties payable by Century would have been deferred by reason of strikes, Acts of God, earthquakes, or things like that, for the period in which these events occurred. We think that is material. We want to point out that after the exercise of the option there was no condition like that at all, that the full "burdens of ownership," if you can call them that, as well as the benefits of ownership, were in Century, that if there was a strike, earthquake or Act of God, the loss fell upon Century. Prior to that, it fell upon Rainier.

We also rely upon the case of the Board of Tax Appeals, Hammond Lumber Company 352.

So, it is our position, if your Honor please, that the contract was a royalty contract for a period of five years, with an option to purchase, and that in 1940 the option was [111] exercised and by that exercise the licensing provisions of the contract were terminated and its obligation of maintaining a mortgage on the property was terminated, its obligation to impound funds was terminated, its obligation to render monthly and annual statements was terminated, its obligation to turn over the proceeds upon sale of the property terminated, and Rainier's right to terminate the contract because of Century default was likewise terminated.

We might mention the fact to your Honor that the Century Brewing Association, which is the party to this contract, under the contract itself was permitted to change its name to the Seattle Brewing & Malting Company, and that is why we put that diagram up there, so there would be no confusion.

I might state that we recognize the Commissioner of Internal Revenue has the right to take inconsistent positions. I might state that the Commissioner has taken the position in another case already submitted to the Tax Court that this was a sale and not a prepayment of royalty. I wish to say that I thoroughly agree with the position the Commissioner took there. I compliment him on his very able presentation of the law and his very able brief. I am glad to agree with the Commissioner in that respect.

The Court: That is the case that was tried in Seattle on the last calendar, before Judge Mellott, is that [112] right?

Mr. Mackay: That is right, your Honor.

One other thing I wanted to point out: it should be noted that if a transaction is held to be a sale, then no part of the gain will be subject to profits tax, for Section 721 of the Code so provides. However, if the Court should be of the opinion that the transaction did not constitute a sale, the taxpayer contends that in the alternative the notes of $1,000,000 constitute a return of capital. Also, where it is well settled that the Internal Revenue Code does not define what is a return of capital and what is income, the decision of course is left to the Court.

I might state as a further alternative issue, the Petitioner contends that if it is held that notes constitute ordinary income, it is entitled to a deduction for the exhaustion there during 1940, and another alternative position is that if it is held to be an ordinary income, then none of that would be

subject to excess profits tax because it would be abnormal income within the provisions of Section 721 of the Internal Revenue Code.

I think that is all.

The Court: Mr. Neblett?

Opening Statement on Behalf of the Respondent

By Mr. Neblett:

Mr. Neblett: May it please the Court, the taxes [113] in controversy are income and declared value excess profits taxes, and excess profits taxes for the calendar year 1940 in the respective amounts of $235,321.78, $18,617.60, and $285,948.74, for the year 1940, and excess profits tax for 1941 of $26,119.93.

The issue with respect to 1941 has been abandoned by the Petitioner, so that the deficiency for that year would be the $26,119.93.

Your Honor, the total deficiencies are approximately $566,008.04.

As we understand it, the issues are:

1. Whether the Petitioner derived ordinary income in the amount of $1,000,000 in the calendar year 1940, or was said amount the proceeds from the sale of a capital asset in said year?

2. Whether the Petitioner is entitled to use the March 1, 1913 value of the "right" transferred on July 1, 1940, and if so, what is the March 1, 1940 value of such "right?"

3. Whether any part of the $1,000,000 received by Rainier Brewing Company is abnormal income attributable to years prior to 1940 within the meaning of Section 721 of the Internal Revenue Code?

Your Honor please, the government's theory on

these issues is as follows: that the transaction of 1940 was a [114] commutation of the royalty payments under the contract of 1935, producing ordinary income to Rainier. This, your Honor, is not necessarily in conflict with the government's position in the Seattle Brewing & Malting Company case, because Seattle Brewing & Malting Company obtained for a lump sum payment a right to use a trade name for an indefinite period of time. Hence no basis for a deduction has been established insofar as the Seattle Brewing & Malting Company case is concerned. We refer, your Honor, in support of that position, to Whitman & Sons, 11 BTA 1192.

Our next position, your Honor, is that there was no sale of a capital asset, because Rainier still owned a title and property in the trade mark and the trade name "Rainier" and "Tacoma," and good will, if any, the allotment to Seattle (formerly Century) being in the nature of a perpetual license, and is similar to a transaction such as those considered in Clifford Goldsmith v. Commissioner, 143 Fed. (2d) 466, certiorari denied 323 U.S. 774, and M. Whitmark & Sons v. Pastine Amusement Co., 298 Fed. 470, affirmed, Fourth Circuit, 2 Fed. (2d) 1020.

Our next position, your Honor, is that whatever good will, and so forth, Seattle owned in 1913, migrated in 1915 with the advent of statewide prohibition. Seattle Brewing and Malting Company had abandoned its plant in Washington as a brewery at that time, and as we understand, it was never [115] used again by Seattle or its successors as a brewery.

In 1916 Rainier Brewing Company of Washington took over the operations in San Francisco, where the beer was manufactured under the name of Rainier Brewing Company, Seattle Brewing & Malting Company to be entitled to all of Rainier's profits.

If, after 1916, Rainier beer was sold under the name of Rainier Brewing Company, it would appear that there are grounds for contending that whatever good will Seattle Brewing & Malting Company of West Virginia had at that time was lost by disuse.

The next position: It is the government's theory with respect to Section 721 of the Internal Revenue Code, "Abnormal Income," is that since the transaction of 1940 was a commutation of the royalty payments that Seattle would otherwise have made in the future, the income must fall into 1940. If the circumstances had been such that there was a commutation of payments for a specified future time, then there would be no grounds of allocating over such term. Since here the commutation is for an indefinite time, intended to be perpetual, it would be purely speculation to allocate over a future time.

Your Honor please, it might be right at this point to set out clearly that under your view of this case, the only thing transferred was the sole and exclusive and perpetual right to use the trade name "Rainier" and "Tacoma" in the [116] State of Washington and Territory of Alaska, and to market and manufacture beer under that name and that name alone, and when we come to get the March 1, 1913

value, we have to stick to the sale of that trade name alone.

Your Honor please, it is always a very good idea to go right back to the deficiency Notice and what the Deficiency Commissioner said in his Deficiency Notice.

Regarding the $1,000,000 received by Rainier Brewing Company, the Commissioner stated in his Deficiency Notice as follows:

> "(a) In the taxable year you received a payment of One Million Dollars ($1,000,000) from the Century Brewing Association under a contract executed in 1935, whereby you granted to Century Brewing Company a license to use trade names held by you in connection with the marketing of beer, ale, and other alcoholic liquors made from malt in the State of Washington and the Territory of Alaska. No income from such payment was reported in your return for 1940. You contend that the receipt of One Million Dollars ($1,000,000) represented the proceeds of a sale by you of good will and an interest in the trade names, that such good will and trade names have a basis represented by the market value at March 1, 1913, in excess of the proceeds, and that hence no deductible loss was allowable and no taxable gain was reportable.
>
> "It is held that the contract executed in 1935 did [117] not affect the sale of trade names or good will, that the payment of One Million

Dollars ($1,000,000) received by you in 1940 was ordinary income taxable in full without any offset for the claim basis.

"It is further held that since the transaction did not constitute a sale, the income realized in 1940 may not be excluded from excess profits net income under Section 721 of the Internal Revenue Code."

Your Honor please, that is the exact wording of the Deficiency Notice. Obviously in view of Mr. Mackay's opening statement, Seattle Brewing & Malting Company, Docket No. 2265, has a bearing on this subject case.

Incidentally, your Honor, Mr. Mackay and his associates filed a very able and learned brief amicus curiae in that case.

Mr. Mackay: Thank you.

Mr. Neblett: I am glad to make the statement, Mr. Mackay.

The Seattle Brewing case is presently awaiting decision by the Tax Court, having been heard in Seattle before Judge Mellott on October 31st. The years in that case, your Honor, are 1940 and 1941.

In view of the relation between the two cases, I desire to call your Honor's attention to the wording of the Deficiency Notice in the Seattle Brewing & Malting Company [118] case. Said Deficiency Notice reads as follows, for the year 1940, and it is exactly the same for the year 1941, except a different amount of deduction is claimed.

"(a) It is held that you are not entitled

to amortization of any part of the cost of the perpetual right and privilege to manufacture and market beer and other alcoholic malt beverages under designated trade names and brands purchased in 1940 for One Million Dollars ($1,000,000). The deduction of $56,498.13, which was claimed on your return as amortization of the cost of such perpetual rights and privileges is therefore disallowed and added to the income shown on your return."

The deduction claimed in 1941, your Honor, was $142,821.04.

The ultimate question, therefore, in the Seattle Brewing and Malting Company, Docket No. 2265, is not the same as the question in the instant case. The question there, your Honor, was whether Seattle Brewing & Malting Company was entitled to deduct from income for '40 and '41 any portion of the contract price of $1,000,000. It agreed in 1940 to thereafter pay Rainier Brewing Company, Incorporated, of San Francisco, California, in order to terminate all royalties thereafter payable under their existing agreement of April 23, 1935, by virtue of which contract and consideration Seattle Brewing & Malting Company acquired the exclusive and perpetual right [119] to thereafter manufacture and market beer and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under their trade name "Rainier" and "Tacoma," together with the right to perpetually use it in all trade marks, copyrights, labels or other advertising media thereafter adopted or

used by Rainier Brewing Company in connection with such products. Rainier's agreements, your Honor, was not to compete in that business in the assigned territory.

Respondent took the position, in other words, in the Seattle case that the sum paid or agreed to be paid by Seattle Brewing & Malting upon exercising the option in 1940 under its contract with Rainier Corporation for the several intangible properties and property rights acquired under such contract, constituted a capital expenditure, no part of which may be deducted as an expense or otherwise, and, second, that Seattle, by exercising the option in 1940, converted an existing contract from a royalty basis to a capital transaction.

We further took the position in that case, your Honor, that deductions are not allowable as a matter of right by statutory grace, and may be permitted only where specifically authorized by statute. Respondent made an alternative contention in the case, which is not material here.

Additionally, your Honor, Respondent took the further position in the Seattle Brewing & Malting Company case that irrespective of whether the transfer of the right, and [120] soforth, constituted a capital transaction or a license, Seattle Brewing & Malting Company would not be entitled to a deduction because, first, the $1,000,000 payment had no relation to production, and second, the right was of indeterminate life.

Those two points alone, your Honor, were fatal to Petitioner's contention in this Seattle Brewing

& Malting case, irrespective of whether the transaction could be called a capital transaction or a license.

Your Honor please, that constitutes briefly the position taken by the Respondent in the Seattle Brewing and Malting Company case. We might have been wrong in our position up there, your Honor, and in order to protect the revenues, Respondent is now contending and will put into this record all of the evidence he can find bearing on this question, whether it helps or hurts, with respect to the issue here.

In the instant case we shall take the position that Seattle Brewing was merely a licensee, and that insofar as Rainier Brewing is concerned, no sale occurred so as to constitute a capital transaction, which position is consistent with the Deficiency Notice in this case, your Honor, that we read into the record.

I think it may be properly pointed out, your Honor, that the taxability of amounts received by Rainier and deductions [121] claimed by Seattle are not measured or determined by the same statutory rules. There is no necessary reciprocal relation between the two. In other words, your Honor, the Respondent can consistently win both of these cases, irrespective of whether the assets transferred are called a capital asset or a license. The transfer of the rights could very properly be a capital transaction insofar as Seattle Brewing & Malting is concerned, and ordinary income to Rainier Brewing Company.

It can very properly be argued that the sale of the right by Rainier was merely the sale of its stock in trade, and for that reason ordinary income.

For example, your Honor, an architect draws plans for a building. Insofar as the owner of the building is concerned, it is a capital transaction, but he, the architect, gets his ordinary income. Under the contract of April 23, 1935, Seattle Brewing & Malting could have continued to pay royalties. There was no obligation requiring Seattle Brewing & Malting Company to exercise the option to terminate the royalties. In fact, it can be argued that Seattle Brewing got very little of anything that it did not already have by exercising the option. There is no occasion for Seattle Brewing Company to exercise the option in order to keep on using the name "Rainier" in the State of Washington and the Territory of Alaska. [122]

True, by exercising the option, Seattle Brewing & Malting has substantially cut down future payments of royalties.

Your Honor please, right at that point, when the contract was entered into in 1935, Seattle Brewing was not so sure that they could make a go of that name, apparently, so they thought they would take an option, after trying it out for five years to see whether they really wanted to purchase it, and after working with it for five years and making quite a little money, they decided they would purchase it for the $1,000,000 we are talking about here. There is no doubt about the fact that Seattle Brewing acquired a right in perpetuity when it

entered into the contract of April 23, 1935, as long as it did not default under the contract.

Your Honor please, if at any time since Seattle had defaulted under that contract, the properties and other things would have gone back to Rainier, the seller, the Petitioner here. Only in the case of default was there a referrer to Rainier of the assets transferred.

Mr. Mackay has adverted to several other facts, your Honor, so I will not repeat all the facts. I am just going to repeat enough facts to develop our theory and to present the picture in a little fuller detail.

As above stated, and as pointed out by opposing counsel, on April 23, 1935, Rainier Brewing Company, Inc., a [123] California corporation, entered into a contract with Century Brewing Association, a Washington corporation, the latter corporation now known as "Seattle Brewing & Malting Company." This contract recited that Rainier was engaged in manufacturing beer, ale and other alcoholic malt beverages, with plants located at San Francisco, California and Seattle, Washington, and in marketing said products in eleven western states, the Territory of Alaska and Hawaii and elsewhere; that Century Brewing Association was engaged in the manufacture of beer and other malt products, with a plant at Seattle, Washington, and in marketing said products in the States of Washington and Oregon, the Territory of Alaska and elsewhere.

For many years Rainier had sold and marketed its product in Washington and Alaska under the

trade name and brands of "Rainier" and "Tacoma." Seattle Brewing & Malting Company desired to acquire the plant and certain other of Rainier's personal property in Seattle, Washington, and to secure the sole and exclusive and perpetual right and privilege of manufacturing and marketing beer, ale and other alcoholic beverages under said trade name within the State of Washington and the Territory of Alaska.

These are the provisions in the contract.

Incidentally, your Honor, I picked some of that wording from Mr. Mackay's able brief amicus curiae in the Seattle case. [124]

That Rainier was willing to sell this plant and personal property and to grant said perpetual right and franchise upon the terms and conditions set forth in the agreement.

Pursuant to the terms of the contract, Rainier transferred and Seattle Company acquired the Seattle plant for the sum of $250,000 and certain personal property, namely, payrolls and containers, cases, sales material, office fixtures and equipment, and all beer on hand.

Paragraph 7 of the contract is as follows:

> "(7) Rainier hereby grants to Century the sole and exclusive perpetual right and license to manufacture and market beer, ale and other alcoholic malt beverages within the State of Washington and the Territory of Alaska under the trade name and brands of 'Rainier' and 'Tacoma,' together with the right to use within

said State and Territory any and all copyrights, trade marks, labels or other advertising media adopted or used by Rainier in connection with its beer, ale or other alcoholic malt beverages."

In consideration of the right thus granted Petitioner, Seattle agreed to pay Rainier a royalty of seventy-five cents per barrel on all such beverages sold in Washington and Alaska under the trade name "Rainier" and "Tacoma," up to 125,000 barrels annually, and a royalty of eighty cents per barrel on all such beverages sold in excess of 125,000 barrels [125] per year. The minimum royalty, however, was to be the sum of $75,000 per year.

The contract further provided in paragraph 13, which is extremely important, your Honor, in this case:

"It is understood and agreed by and between the parties hereto that at any time after this agreement has been in force for five years, Century shall have the right and option of electing to terminate all royalties thereafter payable hereunder by notifying Rainier of its election to do so,——"

Notice those words "terminate all royalties," your Honor.

"——and by executing and delivering to Rainier the promissory note of Century aggregating in principal amount the sum of One Million Dollars ($1,000,000), dated as of the date

of the exercise of such option, bearing interest from date at the rate of five per cent (5%) per annum, which said promissory note shall be divided into five (5) equal maturities, and shall be payable respectively on or before one (1), two (2), three (3), four (4), five (5) years after the date thereof."

That option, your Honor, was exercised on July 1, 1940.

To sum up very briefly the more important clauses in that contract, because after all the four corners of that [126] contract will probably determine the question:

1. As I said before, Century agreed to buy from Rainier, for the sum of $250,000, the land and building comprising a brewery in Seattle then owned by Rainier, but which had been operated very little.

2. Century also agreed to buy from Rainier for stated amounts certain bottles, cases and other equipment, and all beer in retail dealers' hands as of July 1, 1935.

3. Rainier granted to Century the exclusive right to manufacture and market beer under the trade name as I have previously mentioned.

4. Rainier agreed that during the time this agreement remains in force, it would not manufacture, sell or distribute within the territory covered by the agreement, directly or indirectly enter into competition with Century in said territory, it being agreed, however, that Rainier could retain the exclusive right to manufacture, sell and distribute

non-alcoholic beverages within such territory under the trade name "Rainier" and "Tacoma."

Your Honor, right there is an interesting point, that even though Rainier gave to Seattle Brewing and Malting Company the perpetual right to sell beer and alcoholic malt beverages in the State of Washington and Territory of Alaska, Rainier retained the right to sell non-alcoholic beverages in the State of Washington and the Territory of Alaska under the [127] trade name "Rainier." That is a very important point in the case, your Honor.

Next, Rainier agreed that any time after this agreement had been in force for five years, Century could have the right and option of electing to terminate all royalties thereafter by exercising and delivering to Rainier promissory notes aggregating $1,000,000, payable in one, two, three, four, five years.

Next, Century agreed, during the period this agreement remained in force, it would purchase from Rainier all of the malt required by it to manufacture beer and ale sold under the trade name "Rainier" and "Tacoma." That was paragraph 14 of the agreement.

Century agreed to use its best effort to increase the volume of sales under the trade name "Rainier" and "Tacoma," so that these sales would equal the volume of sales of all other such products manufactured and sold by Century within the territory covered by the agreement, and would expend in advertising Rainier and Tacoma beer and ale an amount equal to the sum expended by it in adver-

tising all other beverages manufactured and sold by Century within that territory.

In other words, your Honor, Century had an agreement with Rainier that they would spend money advertising the name "Rainier," and I take it if a default had occurred there, [128] these profits would have reverted back to Rainier.

Next, Century agreed that in the event it should fail to carry out the terms of the agreement or make the payments agreed upon, and such failure should continue for thirty days, such failure should be and become an event of default, and that Rainier could cancel the agreement by written notice to Century. That is paragraph 22.

No right of Century under this contract could be assigned without the written consent of Rainier first had and obtained. That is paragraph 24, your Honor.

When you buy something, and it belongs to you, you can sell it, give it away if you want to, but under this contract Seattle Brewing & Malting Company could not assign it to anybody in the world unless they came down here and got Rainier's consent. That makes it look much more like a license than it would a sale.

The contract further provided that should Century at any time be prevented from manufacturing and selling beer, ale or other alcoholic beverages under the trade name "Rainier" and "Tacoma" in a quantity equal to at least 52,000 barrels annually due to governmental regulations, and incidentally, your Honor, general prohibition laws adopted by

the United States of America or the State of Washington. Your Honor, even in 1935 there was a fear lurking that prohibition might come back again. It had quite a bearing on [129] 1913, when the evidence will show that the whiskey business was in a death struggle to stay in business.

Mr. Mackay: This is not whiskey. I object to that.

Mr. Neblett: Well, the beer business. They both are respectable businesses, Mr. Mackay.

Mr. Mackay: Thank you.

Mr. Neblett: Your Honor please, it is evidenced from the terms of the contract just summarized between Rainier and Century that it included rights and privileges of a substantial value other than the right to use the trade name "Rainier" in the State of Washington and the Territory of Alaska. For example, (1) such as Century's obligation to buy malt from Rainier, (2) elimination of competition by Rainier, (3) the obligation on Century's part to expand for advertising, and (4) the obligation on Century's part to purchase the plant of Rainier for $250,000.

Incidentally, your Honor, I have a copy of the original contract here, and it is very interesting sometimes to notice that with respect to the sale of the property itself, the $250,000 transaction, that contract says "Purchase Agreement."

With respect to the sale of the right to do business in the State of Washington and Territory of Alaska, that contract says "License Agreement."

Your Honor please, as we view the issue as defined by the pleadings in this case, the sole and exclusive and perpetual right to manufacture and market beer, ale and other alcoholic beverages under the trade name "Rainier" and "Tacoma" in the State of Washington and Territory of Alaska is the only item to be valued as of March 1, 1913, assuming they are entitled to use a March 1, 1913, value. We will come to that a little later, your Honor.

In short, the March 1, 1913, value of that right, and that right alone entered into the determination of Rainier taxable gain from the transfer in 1940 of the right under consideration in this case. Obviously the amount paid for the right in 1940 by Seattle Brewing would not be any indication of this same right's value in 1913.

The evidence will show, your Honor, that the conditions in 1913, just prior to state-wide prohibition and national prohibition, were entirely different than they were in 1940. The circumstances are so entirely different.

In any event, the amount to be considered as having been paid in 1940 for the elimination of competition would first have to be segregated from the total amount paid, and a determination made of the amount actually paid for the right to use the name "Rainier" before any comparison could be made between the 1913 value of the right with its value in 1940.

Therefore, your Honor, the crucial question is whether Petitioner is entitled to use the March 1, 1913, value of the right, and if so, has it the right

to manufacture and market beer in the assigned territory under the trade name of "Rainier" and "Tacoma"? In other words, your Honor, is Petitioner entitled to use that right, and if so, what was its March 1, 1913, value?

The question after all comes down to: What a prospective buyer as of March 1, 1913, would have been justified in paying for that right, and that right alone, separate and apart from any of the other assets of the business of which it formed a part, and on the basis of the profits which this prospective buyer might expect to receive in subsequent years from the right that he then acquired.

In other words, your Honor, this contract of 1935 had seven or eight things in there that had nothing to do with the sale of that right. Somewhere, somehow, Petitioner must segregate it out and show what that right, and that right alone, to manufacture and market beer in the State of Washington and Territory of Alaska, what was the value of that?

Your Honor please, the test is, what a willing seller will take and what a willing buyer will pay, both having full knowledge of the facts, and neither being under compulsion to buy or sell.

Summarizing, your Honor, two distinct facts must [132] be kept in mind in this case, we think.

First, the question at issue is the market value as of March 1, 1913, assuming Petitioner is allowed to use that value of only the exclusive perpetual right and license to manufacture and market beer within the State of Washington and the Territory of Alaska.

Second, that conditions affecting the value of this right in 1913 were entirely different than in 1940, and

Third, Century in 1940, in consideration for the amount of $1,000,000 then paid, received in addition to the right in question other rights and privileges at that time, but which rights did not in any way form a part of the March 1, 1913, value of the right transferred by Petitioner in 1940.

The evidence will show that in 1913 the Seattle Brewing & Malting Company, then owner of the right in question, owned and also operated a brewery in Seattle, in which it had an investment of approximately $2,900,000. Your Honor, I am trying to be as accurate as I can. That figure may be varied a little. It may be $2,900,000, it may be a little less or it may be a little more. Not including intangibles or investments in other properties, 82 per cent of its total net income was received from sales of beer and ale in the State of Washington under the trade name "Rainier."

Since the evidence will show that a purchaser in [133] 1913 of the rights to sell beer and ale in the State of Washington under the trade name "Rainier" would have also purchased Seattle's brewery, of a value of practically $3,000,000, it must follow that after the sale of that right the Seattle Brewing & Malting Company would have commenced to manufacture and market beer and ale under another name.

In other words, your Honor, if I had gone up there and bought the name, unless I could buy

Seattle Brewing & Malting Company's $3,000,000 brewery, what good would the name do me? Seattle Brewing & Malting Company could step out and sell beer under any other name, and there would be nothing the buyer could do.

The evidence will show that the Rainier Brewing Company, the seller, in 1940 was then operating a brewery in San Francisco, and could therefore dispose of the right in the State of Washington and Territory of Alaska without disrupting its other business at all.

Your Honor please, the contract of April 23, 1935, shows that no good will was transferred to Seattle. In fact, the agreement specifies that Seattle must protect the good will of Rainier Brewing Company in the quality of beer manufactured, and by their advertising, and those provisions are in force today, your Honor, under our theory of this contract. Therefore, the good will of Rainier Brewing Company [134] was a general thing which was retained under the 1935 agreement, and Rainier Brewing Company still retained it. All they sold was a little part (I don't know how they could figure it out, your Honor) of the good will, if they could call it "good will", some sort of intangible value, when they sold the right to use it in the State of Washington and the Territory of Alaska.

In 1913, however, the sales of Rainier Beer, your Honor, (and the evidence will show in some detail) in the State of Washington were by far the larger part of the entire business of the Seattle Brewing and Malting Company. I base that statement on

certain information Petitioner submitted, and I think Mr. Mackay adverted to that in his opening statement.

The agreement under which the right was purchased in 1940 provides that the seller of the right will not directly or indirectly enter into competition with the buyer. Thus, the owner of the right in 1913 could not have made such an agreement without abandoning a brewery worth approximately somewhere between $2,500,000 and $3,000,000. The evidence will show, your Honor, that no such agreement could have been made in 1913.

Additionally, a prospective purchaser of this right in 1913 would therefore have had to face the fact that the volume of sales he might expect would be only from patrons [135] who thought so highly of the name "Rainier" that they would buy no beer or ale sold under any other name, and the further fact that the prior owner of that right was an old and well established organization, and holding a control over a large number of what are called in the beer business, your Honor, "captive saloons", which actually enable it to dictate the brand of beer such saloons might sell if they intended to remain in business as competitors.

The evidence will show, your Honor, that this situation would have a decidedly adverse effect upon the amount a prospective purchaser might otherwise have paid for the right in question.

In other words, your Honor, I think about 80 per cent of the brewery business in 1913 (and it is probably true today) would finance these saloons,

and naturally, if the brewery was financing the saloon, the saloon would have to sell the brand of beer the brewery put out, irrespective of its name.

The evidence will show, your Honor, that Seattle, with a $3,000,000 going concern up there, could have put up a beer under a good old Indian name, "Snoqualmie Falls", for instance, and the man that sold beer right along under the name "Rainier" would not have had anything of value.

Regarding control of saloons in the State of Washington, which would have enabled the seller to remain in [136] competition with the buyer of that right, the evidence will show that the brewers in the State of Washington and elsewhere actually took out and held licenses for a large number of the saloons then in business in that State, and that these saloons very naturally and unquestionably promoted the sale of the brand of beer manufactured by the brewery which held their license. As a matter of fact, your Honor, 80 per cent of the saloons were sold throughout the United States in 1913.

Further, the evidence will show that the Seattle Brewing & Malting Company could, in 1913, after selling the right to use the trade name "Rainier" to another brewery, establish a market for its product under another trade name, for example, and have substantially reduced the volume of sales of Rainier beer, and that any prospective purchaser of the right would have been aware of that fact and given it consideration in any offer made in 1913 for the right to use the trade name of "Rainier" in

the State of Washington and the Territory of Alaska.

The evidence will further show that a purchaser of the right in 1913, before deriving any profit from the sale of beer and ale under the trade name "Rainier", would have to make allowance for the manufacture of these products either by a brewery owned by the purchaser, which would require a reasonable return on the investment in the brewery before any profits could be attributable to the name "Rainier," or by payment of the cost of manufacture to some other brewery. That is the only way a purchaser of that name could have operated in Washington in 1913.

The evidence will show that the earnings of the Seattle Brewing & Malting Company for the five-year period prior to 1913 were sufficient, according to Petitioner's competition, to pay eight per cent return on investment in plant at fifteen per cent on the claimed value of good will, but since another brewery would be required for the manufacture of Rainier beer and ale by the buyer of the right to use that trade name, only that part of the profit from the sale above would be a reasonable return when an acquired investment in the additional plant should be included in the computation of the value of that intangible, which would substantially reduce the Petitioner's formula, which would substantially reduce his value.

Next, the evidence will show, your Honor, that as of March 1, 1913, there was a definite possibility of state-wide prohibition becoming effective in the

State of Washington. In fact, such a possibility had become generally recognized throughout the State of Washington and other states in the Union. The evidence will show that a prospective purchaser of the right in question would have been aware of that possibility. [138]

The evidence will further show that prohibition of the manufacture and sale of intoxicating liquors, including beer and ale, in the State of Washington, became effective January 1, 1916, following the election on November 3, 1914, which was held as a result of a petition filed January 8, 1914, containing the number of signatures required by the initiative and referendum measure which had been passed by the Assembly of Washington and had become effective prior to 1913.

Incidentally, your Honor, those figures are quite interesting. On March 12, 1909, that local option was approved in the State of Washington. In 1910 woman sufferage was adopted in the State of Washington, and I think the evidence will show that the prohibitionists thought that the interests supporting woman sufferage would be supporting prohibition. In 1911 woman sufferage was adopted in California, and as I say, on January 8, 1914, the initiative and referendum measure No. 3 was passed in Washington.

Right along that line, Respondent believes the evidence will show that in 1910 approximately 1650 saloons were operating in the State of Washington. By 1912, 350 saloons had been abolished, and by 1913 a total of 572 saloons had been abolished, leav-

ing 1100 saloons still operating in the State of Washington in 1913. Your Honor please, that is a pretty good trend, and when you are spotting trends, that [139] looks like prohibition was coming along pretty fast.

The evidence will show further that the saloon keepers would buy beer from the brewers that financed them, irrespective of the name of the beer being sold. I have already covered that, your Honor.

In 1913 there had been sustained agitation on the liquor situation for several years, and although the dry forces had been unable to secure the passage in the State Assembly of any prohibition act, they had secured in 1910 passage of the woman sufferage, which they considered helpful to their cause as, rightly or wrongly, they thought the large majority of the women of the State would be in favor of prohibition, and also secure the passage of the prohibition and referendum measure which allowed them to secure the passage of a local measure which had designated each city and county of the State of Washington a unit empowered to hold an election, and if a majority of the voters of the city and county failed to vote for license, the prohibition of the sale of intoxicating liquors in that city or county would become effective ninety days after election.

We will show you no licensed territory in the State of Washington in 1913.

The evidence will show further that a number of the cities and counties of the State of Washington had already held elections and had voted for local

prohibition prior [140] to 1913, and that the effect of those elections had been felt by the brewers of the State of Washington. In other words, in 1913, your Honor, prohibition was winning the West. The situation was becoming acute for the brewers in 1913. That will be the substance of the Respondent's evidence along that line.

Further, in addition to the uncertainty as to the actual market value, if any, in 1913 of the right under consideration, there is also a question as to whether the basis for determination of a taxable gain from the sale of the right sold in 1940 is in fact a March 1, 1913, value of the right then owned by the Seattle Brewing & Malting Company.

Your Honor please (and this is a very important point from the Respondent's standpoint), I am referring now to the Haberle Springs case, your Honor. I might state the name of that case, just for the record. Haberle Crystal Springs Brewing Company v. Clarke 280 U.S. 384 L.A.F.T.R. 10267. That case held, your Honor, that petitioners were not entitled to deduction for obsolescence of good will, Justice Holmes writing a very interesting opinion, that the brewery business was extinguished by the National Prohibition Act.

The evidence will show in support of that theory, your Honor, that prohibition became effective in the State of Washington January 1, 1916, and national prohibition January [141] 16, 1920, and for more than fifteen years the manufacture and sale of alcoholic beverages in that State was absolutely prohibited, and during that entire period the right

to manufacture and market alcoholic malt beverages under the trade name "Rainier" very certainly had no market value. Your Honor please, during that period of time the right to market beer was dead.

If, therefore, such value, if any, as the right in question may have had as of March 1, 1913, entirely disappeared by disuse or was extinguished for any other reason, and if that right was worthless for a period of fifteen years or more, can it now be said that the value of that right remained only dormant, and is the proper basis for the sale in 1940, or is the value of that right sold in 1940 something which has been created since the repeal of prohibition? Obviously, your Honor, that very fact, that they put that five-year clause in that agreement of April, 1935, shows that this value here was created after the repeal of prohibition. Therefore the evidence will show that a very substantial part, if not all of it, your Honor, of the value which this right had in 1940, namely, the $1,000,000 was created during the five years from 1935 to 1940. As was above stated, during that period of time Seattle Brewing & Malting Company had to keep the advertising up and make some other provisions. [142]

The evidence will further show that Seattle Brewing & Malting commenced in 1935, made large expenditures for advertising the name "Rainier." In fact, the agreement of April 23, 1935, required Seattle Brewing & Malting to make such expenditures for those purposes.

Just one other thought and Respondent is through with his opening statement, your Honor.

Stipulation No. 3 is not in, but back there in the early years, 1918 and 1919, Respondent allowed Petitioner, then Seattle Brewing & Malting Company, some obsolescence for good will. The Supreme Court came along and said you could not do that, you could not have obsolescence of good will, especially when a business had been destroyed by law. I think they allowed them $406,680.

The result of that, even though it was an unlawful allowance, your Honor, Petitioner has a tax benefit in the year 1918-19. In 1918 the tax benefit was $78,983.92, and in 1919 the tax benefit was $59,153.48, totalling $138,137.40.

Your Honor please, I call that to your Honor's attention at this point, because, assuming you should find that it is entitled to use its March 1, 1913, value, and that it had a value of $138,137.40, then the tax benefit they got for those two years back there would cancel out the March 1, 1913, value, so Petitioner would not have anything, in any [143] event.

Your Honor, please, that briefly covers the Respondent's theories, position and what he will hope to show in this case.

The Court: Mr. Mackay?

Mr. Mackay: Your Honor please, counsel has been very cooperative in trying to shorten the trial of this case, and as a result we have entered into several stipulations.

At this time I should like to offer in evidence a stipulation which has to do with the various non-

taxable reorganizations wherein we agreed that they are non-taxable reorganizations.

The Court: May I ask if you are going to designate these various stipulations by some number, or are you going to call them the "first stipulation," and so on?

Mr. Mackay: Yes. We ought to call this "No. 1," please, if we may.

The Court: Have you so designated them?

Mr. Mackay: Will you please write "No. 1" on there? We have others, but we failed to do so on No. 1.

The Clerk: Yes.

The Court: That agreed statement of facts which is designated as Stipulation No. 1 is received and made part of the record. [144]

Mr. Mackay: Now, with your Honor's permission, I shall submit Stipulation No. 2, and for the record will state that it merely shows the royalties that were paid by Century during the fiscal years ending from July 1, 1935 to June 30, 1940, and also the number of barrels of beer that were sold during that time.

The Court: Stipulation No. 2 is received and made part of the record.

Mr. Mackay: I should like to offer now Stipulation No. 3, which has to do with the last point mentioned by counsel for the Respondent, relating to the so-called "tax benefits for 1919 and 1918.

The Court: Stipulation No. 3 is received and made part of the record.

Mr. Mackay: Now, if your Honor please, I

should like to offer as Petitioner's Exhibit 1 a photostatic copy of the contract which has been referred to here, which is dated April 23, 1935, between Rainier Brewing Company and Century Brewing Company.

Mr. Neblett: No objection, your Honor.

The Court: Mr. Mackay, are you offering that as Petitioner's Exhibit 1?

Mr. Mackay: Yes, your Honor.

The Court: Without objection that is received as Petitioner's Exhibit 1. [145]

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 1.)

[Petitioner's Exhibit No. 1 appears in Book of Exhibits.]

Mr. Mackay: Your Honor please, I should like to offer as Petitioner's Exhibit 2 a photostatic copy of a supplemental agreement between the same parties dated July 1, 1935.

The Court: Received without any objection?

Mr. Neblett: That is right; no objection.

The Court: It will be received as Exhibit 2.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 2.)

[Petitioner's Exhibit No. 2 appears in Book of Exhibits.]

Mr. Mackay: I should like to offer as Petition-

er's Exhibit 3 a supplemental agreement between the same parties dated July 18, 1935.

The Court: Without objection, that is received as Exhibit 3.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 3.)

[Petitioner's Exhibit No. 3 appears in Book of Exhibits.]

Mr. Mackay: I should like to offer in as Petitioner's Exhibit 4 a deed dated July 18, 1935, transferring the Washington plant from Rainier to Seattle.

Mr. Neblett: No objection.

The Court: Received as Exhibit 4.

(The document referred to was received in evidence and marked Petitioner's' Exhibit No. 4.)

[Petitioner's Exhibit No. 4 appears in Book of Exhibits.] [146]

Mr. Mackay: I should like to offer in, your Honor please, a copy of the mortgage dated July 19, 1935, from Seattle Brewing & Malting Company to Rainier, securing unpaid balance of $50,000.

Mr. Neblett: No objection.

The Court: Received as Exhibit 5.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 5.)

[Petitioner's Exhibit No. 5 appears in Book of Exhibits.]

Mr. Mackay: Your Honor please, I should like to offer as the next exhibit for Petitioner an agreement which I think may be hereinafter called a "trust indenture," dated July 19, 1935, between Seattle Brewing & Malting Company, formerly Century Brewing Company, and First National Bank of Seattle and Rainier Brewing Company.

Mr. Neblett: No objection.

The Court: Received as Exhibit 6.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 6.)

[Petitioner's Exhibit No. 6 appears in Book of Exhibits.]

Mr. Mackay: Your Honor please, the next exhibit I should like to offer is a supplemental agreement dated November 27, 1935, between the same parties.

Mr. Neblett: No objection.

The Court: Received as Exhibit 7.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 7.)

[Petitioner's Exhibit No. 7 appears in Book of Exhibits.] [147]

Mr. Mackay: Your Honor please, I should like to offer as the next exhibit a letter dated July 1, 1940, from Seattle Brewing & Malting Company to Rainier Brewing Company, exercising the option that we have just discussed.

Mr. Neblett: No objection.

The Court: Received as Exhibit 8.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 8.)

[Petitioner's Exhibit No. 8 appears in Book of Exhibits.]

Mr. Mackay: I might explain that attached to that exhibit is a letter to the Anglo California National Bank dated July 1, 1945, and also a promissory note.

Your Honor please, I would like to offer as Petitioner's next exhibit a copy of a Satisfaction of Mortgage dated February 2, 1942, relating to the mortgage dated July 19, 1935.

Mr. Neblett: No objection.

The Court: Received as Exhibit 9.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 9.)

[Petitioner's Exhibit No. 9 appears in Book of Exhibits.]

Mr. Mackay: Your Honor please, the next exhibit I would like to present is a photostatic copy of a letter dated April 11, 1942, from Seattle Brewing & Malting Company to Mr. Joseph Goldie, President of the Rainier Brewing Company.

Mr. Neblett: Mr. Mackay, I had not seen a copy of this letter. What is the purpose of this

testimony? It [148] refers to the fact that the State of Idaho has been added to the contract.

Mr. Mackay: That is all.

Mr. Neblett: No objections, your Honor.

The Court: Received as Exhibit 10.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 10.)

[Petitioner's Exhibit No. 10 appears in Book of Exhibits.]

Mr. Mackay: I should like to offer a photostatic copy of a letter dated April 13, 1942, from Rainier Brewing Company to the then Seattle Brewing & Malting Company.

Mr. Neblett: No objection, your Honor.

The Court: Received as Exhibit 11.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 11.)

[Petitioner's Exhibit No. 11 appears in Book of Exhibits.]

Mr. Mackay: Your Honor please, I offer in evidence as the next exhibit a photostatic copy of a letter dated November 25, 1942, addressed to the Rainier Brewing Company from Seattle Brewing & Malting Company, which has a copy of a letter dated November 25, 1942, to Seattle Brewing & Malting Company from Rainier, and also a copy of a letter dated November 25, 1940, to the First Trust

National Bank of Seattle, from Rainier Brewing Company, and also a copy of a trust indenture, 25th day of November, 1942.

Mr. Neblett: If your Honor will just bear with us for a second. I think this is all right, but I will have to [149] make a little check.

The Court: Mr. Mackay, you have a good many exhibits to offer and I think the reporter should have a rest now. I am sure the reporter did a magnificent feat of reporting during those long opening statements, and particularly considering the rapidity of the very fluent Mr. Neblett. I think, in the beginning, we should thank the reporter, and in that connection I am going to ask you to please remember the reporter. I will take a recess every hour or hour and a half.

Mr. Mackay: I think that is quite kind.

(Short recess.)

The Court: An exhibit was offered. It was being checked by Mr. Neblett.

Is there any objection?

Mr. Neblett: No objection.

The Court: Received as Exhibit 12.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 12.)

[Petitioner's Exhibit No. 12 appears in Book of Exhibits.]

Mr. Mackay: Now, if your Honor please, I should like to offer in as the next exhibit of Peti-

tioner a consolidated balance sheet for the fiscal years ending June 30, 1907, 1908, 1909, 1910, 1911 and 1912.

Mr. Neblett: Mr. Mackay, I notice——

Mr. Mackay: That is the same copy that I gave you. [150] I mean they are copies exactly.

Mr. Neblett: I notice that you only go to 1912.

Mr. Mackay: We are coming down with some others to go into '13 and '14.

Mr. Neblett: With that understanding, your Honor, no objection.

The Court: Received as Exhibit 13.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 13.)

[Petitioner's Exhibit No. 13 appears in Book of Exhibits.]

Mr. Mackay: The next exhibit, if your Honor please, I should like to offer is a statement of income and earned surplus for the same years, beginning June 30, 1908 and ending June 30, 1912.

Mr. Neblett: I just wanted to make sure that you are bringing that down to 1913.

Mr. Mackay: Yes, I am.

Mr. Neblett: With that understanding on it, no objection.

The Court: Received as Exhibit 14.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 14.)

[Petitioner's Exhibit No. 14 appears in Book of Exhibits.]

Mr. Mackay: The next one I should like to offer, if your Honor please, is a statement of sales, costs of goods sold and gross profit on sales for the years during June 30, 1908 to and including June 30, 1912. [151]

Mr. Neblett: With the same understanding, we have no objection, your Honor.

The Court: Received as Exhibit 15.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 15.)

[Petitioner's Exhibit No. 15 appears in Book of Exhibits.]

Mr. Mackay: If your Honor please, I would like to offer the balance sheet of June 30, 1913, which was prepared from the books and checked by the Federal agents.

Mr. Neblett: No objection.

The Court: Received as Exhibit 16.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 16.)

[Petitioner's Exhibit No. 16 appears in Book of Exhibits.]

Mr. Mackay: If your Honor please, I would like to offer in the photostated copy of the balance sheet, June 30, 1914 to 1915, which has been prepared from the books.

Mr. Neblett: Your Honor please, no objection subject to check. Our agent has not checked this particular sheet.

The Court: You will make note of that, then, that you are going to check Exhibit 17?

Mr. Neblett: Yes, your Honor.

The Court: Received as Exhibit 17, subject to check.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 17.)

[Petitioner's Exhibit No. 17 appears in Book of Exhibits.]

Mr. Mackay: Now, if your Honor please, I would like [152] to offer the next exhibit, which is called a "Statement of Income and Earned Surplus for the Year Ended June 30, 1914."

Mr. Neblett: We have a copy of that, Mr. Mackay. No objection.

The Court: Received as Exhibit 18.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 18.)

[Petitioner's Exhibit No. 18 appears in Book of Exhibits.]

Mr. Mackay: If your Honor please, I should to offer now a statement of income and earned surplus for the years ended June 30, 1914 and 1915.

Mr. Neblett: No objection on this, subject to check.

The Court: Received as Exhibit 19, subject to check.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 19.)

[Petitioner's Exhibit No. 19 appears in Book of Exhibits.]

Mr. Mackay: Then, if your Honor please, I would like to offer a photostatic copy from the books of the Company, which is entitled "Comparative Statement of Sales and Net Profits by Agencies, Beginning with Year Ending June 30, 1903", and it goes down to 1913.

Mr. Neblett: No objection on it, subject to check.

Mr. Mackay: I might state, Mr. Neblett, this is an exact photostatic copy of it, but I don't mind your checking it. [153]

The Court: Received as Exhibit 20, subject to check.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 20.)

[Petitioner's Exhibit No. 20 appears in Book of Exhibits.]

Mr. Mackay: If your Honor please, I should now like to offer in as the next exhibit, "Seattle Brewing & Malting Company"; which I might state was the predecessor of this Petitioner, and it is

entitled "Organization Expenses and Purchase of Goodwill as set up through Audited Vouchers".

Mr. Neblett: No objection.

The Court: Received as Exhibit No. 21.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 21.)

[Petitioner's Exhibit No. 21 appears in Book of Exhibits.]

Mr. Mackay: The next exhibit, your Honor please, that I would like to submit——

Mr. Neblett: Just a minute. Could I interrupt you?

Mr. Mackay: I am sorry.

Mr. Neblett: Could you give us a copy of the last exhibit, Mr. Mackay?

Mr. Mackay: Oh, yes, indeed. (Handing document to counsel.)

The next exhibit is a photostatic copy entitled "Seattle, Novemebr, 1912", and it has to do with a writeoff of good will and some expenses. [154]

Mr. Neblett: No objection. If you will furnish us with a copy, Mr. Mackay?

Mr. Mackay: Oh, yes.

The Court: Received as Exhibit 22.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 22.)

[Petitioner's Exhibit No. 22 appears in Book of Exhibits.]

Mr. Mackay: The next exhibit I should like to offer, if your Honor please, is entitled "Seattle Brewing & Malting Company, (A Washington Corporation) and Seattle Brewing & Malting Co., (A West Virginia Corporation), earnings by periods from February 1, 1893 to June 30, 1915".

Mr. Neblett: No objection.

Could we be furnished a copy?

Mr. Mackay: Oh, yes indeed.

The Court: Received as Exhibit 23.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 23.)

[Petitioner's Exhibit No. 23 appears in Book of Exhibits.]

Mr. Mackay: The next one is entitled "Seattle Brewing & Malting Co., Tangible Asset Value as of June 30, 1907 to 1912 inclusive".

Mr. Neblett: No objection, your Honor, subject to check.

The Court: Received as Exhibit 24, subject to check [155]

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 24.)

[Petitioner's Exhibit No. 24 appears in Book of Exhibits.]

Mr. Mackay: Your Honor please, the next exhibit I would like to offer is entitled "Seattle

Brewing & Malting Company Tangible Asset Value of June 30, 1913".

Mr. Neblett: No objection.

TShe Court: Received as Exhibit 25.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 25.)

[Petitioner's Exhibit No. 25 appears in Book of Exhibits.]

Mr. Mackay: If your Honor please, the next exhibit I should like to offer is a statement showing the dividends paid by periods from February 1, 1893 to June 30, 1915.

Mr. Neblett: No objection.

The Court: Received as Exhibit 26.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 26.)

[Petitioner's Exhibit No. 26 appears in Book of Exhibits.]

Mr. Mackay: Your Honor please, the next one I should like to offer—it is marked "Exhibit D" here—but it is "Seattle Brewing & Malting Co., Analysis of Construction Property Accounts and Other Fixed Assets, Segregated as to Property Located in State of Washington, and Property Outside the State of Washington".

Mr. Neblett: Covering what period?

Mr. Mackay: Covering the period from 1908 to 1912.

Mr. Neblett: I have no objection, subject to check, [156] your Honor.

The Court: Received as Exhibit 27, subject to check.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 27.)

[Petitioner's Exhibit No. 27 appears in Book of Exhibits.]

Mr. Mackay: Now, if your Honor please, I have with me here some original prizes that were obtained by the Seattle Brewing & Malting Company, the predecessor of the Petitioner, one at the Exposition Universelle, Paris, in 1900, which is the Grand Prize, and the other one at the Alaska Yukon Pacific Exposition in Seattle in 1909, which was also the Grand Prize. These are prized exhibits of the company, and with your Honor's permission and counsel's permission, I should very much like to not leave these valuable things with the Tax Court, but to submit photographic copies.

Mr.N eblett: Mr. Mackay, are these prizes for Rainier beer, is that it?

Mr. Mackay: No, sir. For beer.

Mr. Neblett: Just what are they?

Mr. Mackay: Rainier Beer. You can see on there, it says, "Seattle Brewing & Malting Company, Gold Medal". I am thinking now of the Alaska Yukon Pacific Exposition. This is the Grand Prize for beer at that Exposition.

The Court: I think Mr. Neblett's point is that

the pictures of the medals of course are good pictures, but they [157] do not tell why the medal was awarded.

Mr. Mackay: I was going to bring that up later with a witness, if your Honor please.

Mr. Neblett: I was trying to find the word "Rainier" written on this thing.

Mr. Mackay: It is there, if you put your glasses on.

Mr. Neblett: I have them on.

Mr. Mackay: I beg your pardon.

(After examining) I think you are right.

The Court: You really are being skeptical about this, Mr. Neblett.

Mr. Neblett: Well, I have tasted Rainier beer, your Honor.

Mr. Mackay: No, you are quite right. "Rainier" is not on there, but I will prove it by a witness. I intended to do that with these prizes for Rainier beer.

Mr. Neblett: I don't think the medals at this point, your Honor, have been sufficiently identified. The word "Rainier" does not appear on them. It might have been "Tacoma" beer.

Mr. Mackay: I will call Mr. Samet. I am sorry, but I thought there would be no objection.

Mr. Neblett: I am sorry.

The Court: Will you step forward, please, to the [158] witness stand?

Whereupon,

RUDOLPH SAMET

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your full name?

The Witness: R. Samet.

The Clerk: Your first name?

The Witness: Rudolph.

By Mr. Mackay:

Q. Mr. Samet, you are a resident of Seattle, are you? A. Yes, sir.

Q. Were you connected with the Seattle Brewing & Malting Company at about 1913 and prior thereto? A. Yes, sir.

Q. I show you some medals here which show Alaska Yukon Pacific Exposition at Seattle, 1909, and this one shows the Grand Prize. I will ask what that prize represents.

Mr. Neblett: Your Honor, objected to on the ground that there is nothing here to show yet—of course, that is a preliminary question, I take it?

Mr. Mackay: Yes.

Mr. Neblett: Could I ask the witness a question on Voir Dire?

The Court: Yes.

(Testimony of Rudolph Samet.)

Voir Dire Examination

By Mr. Neblett:

Q. Did you attend this Alaskan Exposition, Mr. Samet? A. I did.

Q. You did? A. Yes, sir.

Q. And the prize which you now have before you was issued to what company?

A. It was given to the Seattle Brewing & Malting Company for the exhibit of their Rainier beer.

Q. For the Rainier beer? A. Yes.

Q. Did Seattle Brewing & Malting Company enter any other beer in that contest? A. No.

Q. They did not? A. No, sir.

Q. Did the Seattle Brewing & Malting Company have any other beer at that time under any other name?

A. Yes. There was a beer called "Bayview".

Q. "Bayview Beer"?

A. Bayview beer, but there was hardly any sold. Very little Bayview has been sold. It was the Rainier beer which [160] was the seller.

Q. Was the Bayview beer entered in this contest in Alaska? A. No, sir.

Q. How does it happen, Mr. Samet, that the name "Rainier" does not appear on that medal?

A. Wait a minute. (After examining) I presume—you know, the prize was given to the manufacturer, not to the product. You know, the manufacturer of anything, he got the prize for manufacturing this kind of beer.

(Testimony of Rudolph Samet.)

Q. Were any other prizes given to other beer people at the same exposition?

A. No, sir. It was the only one at the time exhibiting beer. There was no other.

Q. No other person was exhibiting beer?

A. No other brewery was exhibiting any beer.

Q. Therefore, being the only company, naturally Seattle Brewing & Malting Company got the only prize, is that right?

A. Yes, but you know, like at every exposition, the judges, they tasted and tested the beer, and then they gave you the prize if you deserved it, you know.

Q. My point is that the Seattle Brewing & Malting Company was the only brewery entered into that contest.

A. I think so. Let me see. It is quite a while. Oh, pardon me. Clausen Brewery had one there, too. There was a [161] Clausen Brewery there in Seattle. They had an exhibit.

Q. Did they get a prize?

A. I don't think so. I don't really remember, but I don't think so.

Q. Well, you don't know?

A. You know, this is the Gold Medal, the first prize, we got. Maybe they got second or third, I forget. But, we got the first prize. I remember that.

Mr. Mackay: Mr. Samet, do you know whether the Seattle Brewing & Malting Company received

(Testimony of Rudolph Samet.)

any other gold medals as first prizes for exhibitions of Rainier beer?

The Witness: Yes. We had an exhibit in Dresden, Germany, and we got a Gold Medal there. You talk about competition. We had plenty competition there, but it was so good that they gave us that medal again, or before. It was in Paris, 1900. I did not mention that. At Dresden and at Paris we got Gold Medals, and on some of our labels the medals appear, or used to appear. It is gone.

Mr. Mackay: If your Honor please, I should like to offer these photostats.

The Court: Have you any objection now?

Mr. Neblett: Just one more question.

By Mr. Neblett:

Q. What was the date of the Yukon Exposition?

A. Pardon me? [162]

Q. What was the date of the Yukon Exposition?

A. It was in 1909, I think.

Mr. Neblett: What exhibit are you offering there now?

The Court: Which are you going to offer? There are two medals.

Mr. Mackay: I was going to offer them as a joint exhibit.

Mr. Neblett: I want them separated.

The Court: They should be separated.

On the medal that was given in Paris in 1900, Seattle Brewing & Malting Company appears on the medal, and also the words "Rainier Beer" appears on the medal.

(Testimony of Rudolph Samet.)

Which are you going to offer first?

Mr. Mackay: I shall offer the one in Paris.

The Court: Any objection?

Mr. Neblett: I object to it on the ground, your Honor, that it shows that this Exposition was held in 1900, which is entirely too remote as to any 1913 value. The beer might have been good beer then, but in thirteen years it could have lost its potency.

Mr. Mackay: It is just a matter of following it up.

The Court: It might have lost that fine, pinpoint bubble carbonization. [163]

Mr. Neblett: Yes, your Honor.

Mr. Mackay: We submit, your Honor, that it is proper.

The Court: The objection is overruled. I will receive that in evidence as Exhibit 28.

(The photograph referred to was received in evidence and marked Petitioner's Exhibit No. 28.)

[Petitioner's Exhibit No. 28 appears in Book of Exhibits.]

Mr. Mackay: The next exhibit I should like to offer is the photographed copies of the Alaska Yukon Pacific Exposition medal.

Mr. Neblett: Object to it on the ground that the photostatic exhibit relates to the year 1909, I believe. It is too remote in order to base a date.

(Testimony of Rudolph Samet.)

The Court: That is received as Exhibit 29, over the objection.

(The photograph referred to was received in evidence and marked Petitioner's Exhibit No. 29.)

[Petitioner's Exhibit No. 29 appears in Book of Exhibits.]

Direct Examination (Resumed)

By Mr. Mackay:

Q. Mr. Samet, I will ask you, you were General Manager of the Seattle Brewing & Malting Company at that time, weren't you?

A. Yes, sir.

Q. These last two exhibits, one in 1900 and one in 1909, I will ask you if the quality of the beer had been maintained [164] subsequent to the time these prizes were given. A. Yes, sir.

Q. You did not reduce the quality at all?

A. Do what?

Q. You did not reduce the quality?

A. Reduce?

Q. Yes. A. No, sir.

Q. You maintained it?

A. We maintained it, and if we found room for improvement, we improved it.

Q. In 1913 the quality was just the same as it was when you——

Mr. Neblett: Just a minute. Your Honor please, that is objected to on the ground that it is an

(Testimony of Rudolph Samet.)

opinion, and nothing has been shown here to show that Mr. Samet is an expert on beer, nor the quality of beer.

By Mr. Mackay:

Q. Mr. Samet, how long have you been in the brewing business? A. Fifty-seven years.

Q. And during that time have you owned and managed breweries? A. Managed breweries?

Q. Yes. [165]

A. I will tell you: I came to Seattle in 1904. At that time I was Manager of the bottling department, and in 1908—it is so long since—I was made General Manager.

Q. As General Manager, was it your duty to maintain the quality of beer that was being put out under the name "Rainier"?

A. Oh, naturally. You know, the General Manager is in charge of everything; also the brewmaster.

Q. Were you constantly testing it to see whether the quality was maintained? A. I was.

Mr. Mackay: I think he is sufficiently qualified.

The Court: Very well.

The Witness: And I went through the brewing school. You know, even in Europe, before I came out here, I learned the brewing business from the ground up.

By Mr. Mackay:

Q. Are you still in the brewery business?

A. I am still, but in Vancouver, B. C.

Q. But that has nothing to do with the Rainier or Seattle Brewing & Malting Company?

(Testimony of Rudolph Samet.)

A. Nothing whatsoever.

Q. Are you running your own brewery company?

A. Pardon me?

Q. You have your own brewery company? [166]

A. No, it is a corporation.

Q. That is what I mean. A. Yes.

Q. But you are a substantial owner in it, are you? A. Yes.

The Court: Will you ask——

Mr. Mackay: Your Honor please, I should like to ask the witness:

By Mr. Mackay:

Q. Had the quality of Rainier beer in 1913 been maintained at least equal to the quality at the time that these various prizes were given at these various expositions?

A. Yes. It has been maintained. It shows by the sales; they grow.

Mr. Mackay: I think that is all on this.

I will have the witness later, if your Honor please, on some other questions, but I think I would rather not go into that right now.

The Court: You may step down.

The Witness: Thank you.

Mr. Neblett: Could I ask just one question, your Honor, on cross examination?

Cross Examination

By Mr. Neblett:

Q. Mr. Samet, what is the name of your company in Vancouver [167] at the present time?

(Testimony of Rudolph Samet.)

A. Brewers & Distillers of Vancouver, Ltd.

Q. When did you disassociate yourself with the Seattle Brewing & Malting Company?

A. With the Seattle Brewing & Malting Company?

Q. Yes.

A. I am not associated with them now.

Q. When did you disassociate yourself?

A. In 1904. I was then with the Seipp Brewery in Chicago, and E. F. Sweeney brought me out here in 1904, to Seattle.

Q. I am afraid it is not quite clear when you left the Seattle Brewing & Malting Company.

A. When I left them?

Q. Yes.

A. That was after they kicked me out, when the general prohibition started. Then I went North, where the business was legitimate.

Q. Exactly. Do you recall when that was?

A. When I went up North?

Q. Yes. A. In 1923.

Q. 1923 when you went to Vancouver?

A. Yes.

Q. Now, going back to the Paris Exposition.

A. Which one?

Q. The Paris Exposition.

A. The Paris, yes.

Q. Didn't some Eastern brewers have beer entries at that exposition?

A. I presume not only Eastern, but all kinds of European brewers, but you know, I did not go to

(Testimony of Rudolph Samet.)

Paris to overlook it. We had that done through an agent.

Q. You did not attend the Paris Exposition?

A. No, sir, not at Paris.

Mr. Mackay: Is that all?

Mr. Neblett: No. One question.

Mr. Mackay: I am sorry.

Mr. Neblett: May we proceed, your Honor?

The Court: Oh, yes. Excuse me.

By Mr. Neblett:

Q. Mr. Samet, are you aware of the fact that there was statewide prohibition in the State of Washington in 1916?

A. 1st of January, 1916.

Q. January 1, 1916? A. Yes.

Q. What did you do between January 1, 1916 and 1923, when you left for Vancouver?

A. I was Vice President and General Manager of the Rainier Brewing Company here. [169]

Q. In—— A. In San Francisco.

Q. In San Francisco? A. Yes, sir.

Mr. Neblett: That is all.

Mr. Mackay: That is all.

(Witness excused.)

Mr. Mackay: I should like to call at this time, if your Honor please, Mr. Weber.

The Court: Will you come forward, Mr. Weber?

No. 11547

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

RAINIER BREWING COMPANY,
A Corporation,

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CORNELIUS G. WEBER

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your name?

The Witness: Cornelius G. Weber, with one "b."

By Mr. Mackay:

Q. Mr. Weber, what is your occupation?

A. I am an engineer and appraiser.

Q. Are you a graduate engineer?

A. I am a graduate from the University of Wisconsin in 1908.

Q. What is your present occupation? [170]

A. I am associated with the American Appraisal Company in Milwaukee, Wisconsin.

Q. How long have you been associated with the American Appraisal Company of Milwaukee, Wisconsin? A. Since the latter part of 1922.

Q. During that time what have been your duties as such an employee?

A. I have worked primarily on special engineering problems and in evaluation of intangibles of various kinds such as patents, water power rights, good will, and—well, a very considerable variety of special reports of all kinds for mergers, and so forth; court testimony.

I have testified in court in a considerable num-

(Testimony of Cornelius G. Weber.)

ber of cases, including three for the Federal government, one before the Interstate Commerce Commission in connection with the Pullman Company, a patent case against New York Rapid Transit Company; that is, the Cincinnati Car Company against the New York Rapid Transit Company. A patent case in the General Tire & Rubber Company and United States Rubber Company.

I have prepared—oh, I think well over two hundred reports of different kinds for companies during that time. I have made valuations of properties for the government, fair market values for the government, and I have pending now a case where I expect I will be called to testify for the government [171] on the fair market value of a property.

I have a very extensive list here of any special kind of jobs that I have done, classified, and if you could care to have me read from that, I can mention some of those.

Q. I would appreciate it. I think it would give some idea particularly of the good will, of fair market value of other intangibles, including trade names.

A. I have a list here of thirty-nine which cover good will, fair market value or other intangibles. It would be kind of lengthy to read these all. It includes five laundries for the United States government, and H. H. Robertson Company of Pittsburgh, Pennsylvania, Motor Master Corporation in Chicago, National Refining Company in——

Mr. Neblett: Your Honor please, we would like

(Testimony of Cornelius G. Weber.)

to have the dates of some of these appraisals as he goes along, if he could give that to us.

The Witness: I have not put the dates on here. This is over the entire period since 1922. Some of these dates I might recall within reasonable limits, but I could not give you all of these dates as I did not think it was necessary to have each one. I would be glad to furnish them later on, if I could.

The Court: That is all right. Just proceed, will you please? But, Mr. Weber, counsel for the Petitioner in this proceeding wants you to state what your experience has [172] been and you are too general. You say that you have done a great many jobs in the valuation of intangibles, and then you have been reading off a few names of large concerns. That does not give the Court any idea of what those jobs were, or what you did or why you did it.

I will try this for a few minutes, and then, Mr. Mackay, I think probably you will have to ask Mr. Weber questions to show his qualifications.

Mr. Mackay: Yes. I appreciate your Honor's suggestion.

The Witness: I made fair market value reports on breweries. For instance, Joseph Schlitz Brewing Company. I recall that. That was in 1923. That was after prohibition.

The Court: That would be a valuation of tangible property, would it not?

The Witness: Yes. That is tangible property, that's right.

(Testimony of Cornelius G. Weber.)

I have made a fair market value for sales purposes of Birk Brewing, Inc., of Long Island City, New York.

I am making, and have made, preparatory to testimony, stock valuation for a large brewery in the Middle West. I don't know whether I would be free to give the name until the case comes up.

I have made a fair market value appraisal of the United States Brewing Company in Chicago, Illinois. [173]

By Mr. Mackay:

Q. Does that involve intangibles, such as good will and trade name?

A. Yes, sir. That involves intangibles broadly, without segregating it into any components, just merely the intangibles over and above what the physical assets were worth and which are termed "good will," as it is generally understood in appraisal practice.

I have made tangible property valuations of the Willow Springs Brewing Company, Omaha, Nebraska; Cream City Brewing Company of Milwaukee; North American Brewing Company, Chicago; Dobler Brewing Company, Albany, New York; Birk Bros. Brewing Company, Chicago; Hass Brewing Company, Hancock, Michigan——

Q. Pardon me. I don't want to interrupt you, but are these just including physical property valuations or also intangibles?

A. These are primarily physical property valuations.

(Testimony of Cornelius G. Weber.)

Rheinlander Brewing Company, Rheinlander, Wisconsin; Schmidt Brewing Company, Detroit, Michigan; South Bend Beverage & Ice Association, South Bend, Indiana; Eckert & Becker, Detroit, Michigan; and I think there were a few others.

I did not put everything down on my list, but in reports on fair market value and good will I have a whole lot of other kinds of enterprises besides breweries. [174]

The Frogwich Manufacturing Company at Carlisle, Pennsylvania, for sales purposes.

Coca Cola Bottling Company of Cincinnati, Ohio, and also the Coca Cola Bottling Company of Cleveland, Ohio, and that, as I recall it, was in connection with some stock matters.

H. H. Robertson Company of Pittsgurgh, Pennsylvania, on account of some reorganization.

Rite-Rite Corporation of Chicago; that was for financing.

Trico Fuse Company, Milwaukee, Wisconsin, for merger purposes.

Oscar Nebel, a hosiery mill. I don't recall the purpose. That was quite some time ago.

Q. Did that involve a good will valuation, too?

A. Yes. These are all market value or good will valuations.

Vacuum Can Company, Chicago, for financing.

Grayberg Oil Company, San Antonio, Texas. That was for financing.

American Metal Products Company, Milwaukee, Wisconsin. That was for financing.

(Testimony of Cornelius G. Weber.)

Gray C. Smith Restaurant in Toledo, for financing.

Lancaster Eagle in Lancaster, Ohio and Lancaster Gasket in Lancaster, Ohio, for sales purposes evaluation; circulation [175] and good will.

National Tennesseean, circulation and good will, which is the equivalent of good will in the newspaper business.

Hurd Lock Company, Detroit, for sales purposes.

Motor Master Corporation in Chicago, for financing.

Superior Paper Products Company, Pittsburgh, Pennsylvania, for sales purposes.

Hudson Manufacturing, Minneapolis, Minnesota, and that was in connection with a law suit.

Illinois Clay Products Company, Joliet, Illinois. I don't recall the purpose of that. That was some time ago.

National Refining Company, Muskegon, Michigan; contemplated sales purposes.

Mr. Mackay: If your Honor please, if I might interrupt, I know the witness can take up a lot of time to show many, many more. I don't want to impose upon the Court in going into that. I think so far as I am concerned he has gone just about far enough on that, unless your Honor would care to hear some more about it.

The Court: No.

By Mr. Mackay:

Q. May I ask you another question, Mr. Weber? I think you stated that you testified for the United States government in respect to certain laundries.

(Testimony of Cornelius G. Weber.)

A. I did not testify with the laundries. I made valuations of the laundries, fair market values.

Q. They included good will values?

A. They included everything.

Oh, I take that back. They don't include the good will value. They include the value of the property for sale or for rent, what you take them over for or sell them for.

Q. Mr. Weber, if you have just one or two more outstanding valuations that you made, particularly of good will and intangibles, I would like to hear it, but I think we ought to shorten it as much as we can.

A. Well, I think I have combed over about two-thirds of the list of the good will valuations.

I have mentioned the breweries. I have five distilleries. I have made valuations of capital stock for a good many clients, and that of course involves largely the principles and the features that go into the valuation of good will.

Estate of Alice Chaplin, Newark Car Wheel Company, Estate of J. W. Sanders,—he is a cotton mill operator, with about six or seven cotton mills down in the South. Rock River Cotton Works, J. H. Williams Drop Forge Company in Buffalo, which is a very large corporation; Micro-Switch Corporation of Freeport, Illinois, Nitrogen Company at Milwaukee, [177] Duff Norton Manufacturing Company, Pittsburgh, Pressed Steel Car Company, Pittsburgh. The State of Utah; I made some valu-

(Testimony of Cornelius G. Weber.)

ations for the State of Utah in connection with a——

Q. Mr. Weber, I forgot to ask: Where is your office?

A. Well, our main office is in Milwaukee, Wisconsin, but we have over twenty offices in——

Q. Where are your headquarters?

A. Mine is in Milwaukee, Wisconsin.

Q. You have offices all over the United States, of course?

A. We have. We have here, and in Los Angeles, and so forth.

Q. Aside from your activity here since 1922 in representing the American Appraisal Company in making appraisals, as you have testified, for commercial transactions and other purposes, are you also connected with a brewery?

A. Yes, I am.

Q. How long have you been connected with the brewing business?

A. Well, I suppose I might say ever since I was born. My grandfather took over a brewery in 1853. That later passed on to my father, and after prohibition we—that is, prior to my father's death we incorporated and we never dissolved the corporation during the prohibition period. We [177] hung onto our trade name, "Pioneer Beer," kept the roof's repaired, and so forth, and in 1933 we rebuilt and started up again.

Q. Are you still operating that brewery?

A. We are still operating this brewery, yes, sir.

The Court: Now we will recess for lunch until 2:00 o'clock.

(Whereupon, at 12:30 P.M., a recess was taken until 2:00 P.M. of the same date.) [179]

Afternoon Session, 2:15 p. m.

CORNELIUS G. WEBER

resumed his testimony as follows:

Direct Examination—(Resumed)

The Court: Do you want the last question and answer read?

Mr. Mackay: No. I think I remember.

By Mr. Mackay:

Q. Mr. Weber, I think when we adjourned for noon you had just stated your experience in a brewery.

Have you had any experience with respect to construction of breweries?

A. I have. I mentioned before I am a graduate engineer from the University of Wisconsin. For a time I worked for a public utility company, and then I spent half a year reconstructing my father's brewery, and after that I went with a firm of consulting engineers rehabilitating and reconstructing paper mills, rubber mills, food concerns, woodworking concerns, and so forth.

I came West in 1912 and was Superintendent of Motor Power for the Cottonwood Coal Company, and I also worked with the Great Falls Power Com-

(Testimony of Cornelius G. Weber.)

pany under Mr. Hovens, who is now President of the Anaconda Copper Company.

In 1914 I had an offer from Milwaukee, a distant [180] relative of mine who is the head of a brewers' institute. They conduct a brewing academy called the Hantke Brewers School, in which they had a model brewery, part of which I constructed and designed. They gave courses in scientific brewing, and I lectured in engineering and at the same time I was given the opportunity to develop a practice in brewery engineering.

I had a retainer from the Cream City Brewing Company, one of the large breweries in Milwaukee, and I redesigned and reconstructed a good part of that brewery. I did work for the Popelgiller Brewing Company, the Rainier Brewing Company and the Independent Brewing Company in Milwaukee. This was in 1914.

The field looked pretty good at that time, to me, and that was why I went into it at that time. I visited all the breweries in Detroit, Minneapolis and St. Paul, and a good many others during that time, and in 1916 I severed my connections because at that time things did not look as favorable as they had in 1914 when I went into this business.

I went back then into consulting engineering with the same firm I had been with before, and I wrote technical articles in connection with my work for a magazine, "Power," "Electrical World," "Coal Age," and one or two others. One was a paper magazine.

(Testimony of Cornelius G. Weber.)

After the depression in 1921 I came with the American [181] Appraisal Company, as I said before, in 1922. During the time I was in consulting practice, I was a full member in the American Institute of Electrical Engineers. I gave that up when I went into the appraisal field, but I am a registered professional engineer in Wisconsin, and that leads me up to the time I went with the American Appraisal Company, and we were discussing before some of the kinds of work that I have done.

Q. Mr. Weber, have you made an appraisal of the good will inherent in the trade name "Rainier" applicable to the State of Washington and the Territory of Alaska at March 1, 1913?

A. I have.

Q. In making that appraisal, what investigations did you make?

A. Well, I made a rather extensive investigation into the past, some of my own experiences around that time, many of which I recall very well. I have gone into many historical records and data that are pertinent as of that time, and I took into account, amongst the other things, four major factors.

One was the outlook for the industry, the brewing industry in general. The next was the outlook for the Pacific enterprise, the Seattle Brewing & Malting Company, and the status it had attained. I went exhaustively into [182] the profits, that is, the operating statements, balance sheets, where the profits were derived from, trends in the business,

(Testimony of Cornelius G. Weber.)

and, from various sources, made comparisons with other breweries at that time and breweries at this time, what the stocks were selling for, and so forth, and what might reasonably have been royalties had the beer at that time—or, the sale of beer in Washington been placed on a royalty basis.

So, taking up these various broader angles in order, I will say that personally in 1914, the outlook was good enough, from my standpoint, to decide definitely to go into brewing engineering, which I did, and pursued for two years.

At that time (in 1911, in fact) this was when we even rebuilt our own brewery. I know from personal experience that ever since I was a child there was always this controversy up and down, up and down. It never seemed to get anywhere. It was just like "Wolf! Wolf! Wolf!" never came.

But, to supplement my own recollections, I dug into some of the history of the period. Well, I found that the State of Maine was the first one to go dry. It was in 1843, but even that State did not remain permanently dry. In the 50's it reversed itself for two years, but then later on again became dry. But, there was a very definite prohibition wave in the early 50's. In 1852 Minnesota, Rhode Island, [183] Massachusetts and Vermont went dry. In 1853 even Wisconsin went dry, although in Wisconsin it was either vetoed or there was some unconstitutionality about it, that it did not remain in that category.

In 1854 Connecticut went dry. In 1855 Indiana,

(Testimony of Cornelius G. Weber.)

Delaware, Iowa, Nebraska, New York and New Hampshire went dry. Then there was a sudden halt in 1856.

By the middle of the Civil War only five of the thirteen states which had gone dry in the 50's remained dry, and within twelve years three of these went wet.

Then there was a gap there. There wasn't much going on.

But, in the 80's, there was another wave. Seven states had voted on the question. Of the seven states that voted on the question, all but North Carolina voted dry.

From 1886 to 1897, fourteen states voted, but only the sparsely settled states of North and South Dakota went dry.

This brings us up to about—well, to 1906, and by 1906 there were only three dry states left after this long period of agitation and ups and downs. These states were Kansas, Maine and North Dakota.

In 1907 to 1909 there was another wave, and six more states went dry; Georgia and Oklahoma in 1907, Mississippi, Alabama and North Carolina in 1908, Tennessee in 1909, [184] but Alabama reversed itself again in 1911, and in 1912 West Virginia went dry.

All of these states that went dry during that last wave were all southern states. There wasn't any one of the states north of the Mason and Dixon line.

It seems to me that there is quite a precedent there, that after these ups and downs and ups and

(Testimony of Cornelius G. Weber.)

downs, and especially since none of the subsequent waves ever reached the crest of the first one, that one would be well justified in believing it was the continuity of the cry of "Wolf! Wolf!" I know we felt that way about it.

But, I went into the matter further. I cast about for literature. I found some up in the Seattle Library where, in the history of prohibition in the State, it winds up that they are faced with the same controversy that existed fifty-seven years ago. But, I found a book that was written by D. Leigh Colvin, Ph.D. Mr. Colvin in 1920 was a candidate for Vice-President on the Prohibition ticket, and the book he wrote was called "Prohibition in the United States." It is a book—including the appendix, it has 655 pages.

But, there are some very significant statements in this book, and I won't burden the Court with going into it exhaustively, although it is very much to the point, especially from pages 373 to 377 inclusive. [185]

After discussing the matter of local option and its effects, Mr. Colvin states, on page 373, as follows:

> "Local option was subject to such continuous and sometimes violent fluctuations and reactions that instead of being a step toward prohibition, it frequently led in the opposite direction. The earlier waves and recessions in a number of states have been referred to. There remains to be studied the period preceding

(Testimony of Cornelius G. Weber.)

1914. A study follows, comparing the number of dry counties in the different states in 1914 with the number in 1918."

Then it continues, and there is a gap there. I am not reading that unless I am requested to do so.

Mr. Neblet: If your Honor please, may I ask, for the purpose of the record, the date of this book that you are reading from?

The Witness: 1926, it was published. I will give you the publisher. George H. Doran Company, copyright 1926.

Mr. Neblett: Your Honor please, based on the ground that this book shows as copyrighted in 1926, it is objected to. The basic factor with respect to the issue is what a man standing on the ground on March 1, 1913, would have paid for this right. This book was gotten out thirteen years later. It is "hind sight," so to speak, from beginning to end. Based on that ground the respondent objects to the witness using that book, which was not gotten out contemporaneously. [186]

Your Honor please, respondent would not have objected to this book, particularly if it had been written in 1912 or 1913, but the witness certainly should not be allowed to take data accumulated in that fashion thirteen years later, and put into the record a book we know contemporaneously was without the basic period.

Mr. Mackay: Your Honor please, it seems to me an outstanding authority on prohibition, as this man

(Testimony of Cornelius G. Weber.)

evidently is, if he is giving a history of prohibition, as the witness has said he is doing, all we are trying to show is the condition as it existed in 1913. That is what the witness is directing the Court's attention to. It is the history there, as he shows it, at the period involved here. It seems to me it is quite competent. How else would we ever find this out otherwise? It may be the history of the United States itself written some time after, but certainly they go into the events current at that particular time, and one may refer to history to show what our forefathers did, where the Civil War happened, and all that, it seems to me, would be included in that background.

The Court: Objection overruled.

You may go ahead.

The Witness: Continuing the quote:

> "The results show that in ten states there was a decrease in the number of dry counties. In three, Ohio, [187] Indiana and Oregon, there was a very decided falling off from the previous years."

Then there is a part which I am not reading, but this is available if it is desired.

Here is another quote:

> "Other recessions were Illinois, thirty-six to thirty-three; Missouri, seventy-seven to seventy-four; Colorado, eleven to ten; California, five to one, and Washington, ten to six."

(Testimony of Cornelius G. Weber.)

Then I am skipping almost two pages.

"From this survey the conclusion is inevitable that the effect of local option as a step to state prohibition prior to the time of the concerted movement toward national prohibition was negligible. Local option as a method had reached its maximum and was beginning its decline prior to 1914. The predominant trend in the local option states was in the direct opposite to prohibition. The step away from prohibition was still more accentuated in the cities. Of the thirty-one cities in the non-prohibition states having a popoulation of over 25,000, which at some time prior to 1908 and 1912 were under local no-license, only twelve were able to maintain a continuous no-license policy until 1914. Nineteen of the thirty-one swung back to the saloon. Three of them subsequently oscillated back again to no-license, but sixteen of the thirty-one remained wet until state or national [188] prohibition was achieved.

"The striking fact is that, outside of Massachusetts, only three cities of over 25,000 in all of the non-prohibition states of the whole country maintained a no-license policy for any length of time."

There is still more, but I am not going to burden you with any more.

Mr. Mackay: Mr. Neblett, if you want a photostatic copy of that, we will be glad to furnish it.

Mr. Neblett: Just keep the book available. It

(Testimony of Cornelius G. Weber.)

really shows that the man who wrote the book was a bad prophet.

Mr. Mackay: I was just trying to be nice!

The Witness: Here is a quotation from the September, 1914, issue of the "Western Brewer." It is headed, "Vice-President Marshall on the National Prohibition Amendment."

> "The prohibition amendment will not pass. The central government has too much power already. Of course, such an amendment, that carries with it property destruction, will not be approved by Congress. Suppose it were possible——"

Mr. Neblett: Just a minute. Could I have the witness identify for the record what he is reading from and when it was written?

The Witness: September, 1914, issue of the "Western Brewer." [189]

Mr. Neblett: September what?

The Witness: 1914 edition of the "Western Brewer."

Mr. Neblett: 1940 or '14, did you say?

The Witness: '14.

Mr. Neblett: Yes.

The Witness: What was the last, please, before the last quote?

The Reporter: "Of course, such an amendment, that carries with it property destruction, will not be approved by Congress."

The Witness: "Suppose it were possible for

(Testimony of Cornelius G. Weber.)

such a foolish amendment to be attached to the nation's constitution, what would become of the millions of dollars invested in liquor industries, or of the hundreds of thousands of persons working in such trades, and who would pay in to the Federal government $250,000,000 which it now collects in taxes from the liquor interests?"

That is part of the story. It is reasonable to assume, it seems to me, that brewers, and people connected with the industry, would be the ones most concerned with this controversial question. I don't believe that anyone would be so imprudent as to deliberately ride into the face of a prohibition wave if he felt that there was any wave like that on the move, instead of an actual ebb, at that time. [190]

People may have their opinions pro and con, but I think an opinion is pretty well fortified when it carries with it a very heavy commitment of money.

I have here for the year 1912, fifty-four pages of photostats; for the year 1913, thirty-three pages, and 1914, thirty-six pages, which are predominantly —I would estimate seventy-five per cent filled with brewery construction news that goes back to that time, the building of new breweries, the expansion of breweries, the organization of new breweries, and of course, it would take hours to go through all of this. I have condensed and marked but a few of the many items of what was going on.

Mr. Neblett: Your Honor please, for the purpose of the record, may we ask the witness if the

(Testimony of Cornelius G. Weber.)

testimony he is now going to give pertains to the State of Washington or the Territory of Alaska?

The Witness: Washington primarily, the West generally, the outlook of the brewing industry in general, and I would take into consideration California and other states, but I can give construction news from Washington, isolated from other states. For example:

"January, 1912. Walla Walla Brewing Company renovated and remodeled the old Stahl Brewery at a cost of more than $70,000, including new building and machinery."

"February, 1912. Seattle Brewing & Malting Company [191] will shortly have plans prepared for the construction of additional storage cellars."

"May, 1912. North Yakima Brewing & Malting Company, extensive improvements in plant and additional machinery."

Angelus Brewing & Malting Company, Walla Walla Brewing: there are different ones here I haven't marked, and I am not reading, but I am coming again now to September 12, Washington.

"Orville Brewing & Malting Company, new brewery incorporation, $15,000."

"Independent Brewing Company, Seattle, is increasing its cellar capacity and having additional storage capacity equipped with direct expansion and new lighting."

"Seattle Brewing & Malting Company has awarded the contracts for extensive improvements and additions to its plant. The plans call for a two-

(Testimony of Cornelius G. Weber.)

story building and a four-story building, additions to the ice plant and storage cellars. Total cost, $50,000. This company is also erecting a brick storage depot and agency building at Great Falls, Montana. The building is 20 feet by 45 feet, and partly two-stories."

"October, 1912. Walla Walla Brewing Company addition to bottling house and new office."

"October, 1912. Seattle Brewing & Malting Company has commenced work on the improvement of the Rainier Brewery, [192] which will mean the expenditure of approximately $110,000 when completed. The stockhouse and racking room are being enlarged, and will increase the annual capacity of the plant by 30,000 barrels. The other improvements consist of an additional boiler room, a large brick smokestack and a hop storage house, an ice machine with a capacity of 400 tons will be installed, and also two 400-horsepower boilers."

"November, 1912. Pacific Brewing & Malting Company, Tacoma, will spend more than $25,000 in improvements, including a large brick addition.

"December, 1912. Seattle Brewing & Malting Company has purchased ground 111x160 feet for $13,000.

"Independent Brewing Company, Seattle, has been granted a building permit for the construction of a two-story brick power house, has placed an order for a 95-ton refrigerating machine.

"Pohle & Ernst, Chewelah, resumed operations.

(Testimony of Cornelius G. Weber.)

The capacity has been doubled and refrigerating machines have been added."

"January, 1913. Olympia Brewing Company has placed order for new coolers using ammonia as a cooling medium."

"Spokane Brewing & Malting Company has secured a building permit for a new brick and concrete bottling plant to replace the present plant. Cost, $22,000.

"Inland Brewing & Malting Company, Spokane, has [193] placed an order for eleven 245-barrel glass-lined tanks.

"Inland Brewing & Malting Company, Spokane, is erecting one of the finest stock cellars in the West, brick and steel construction, four stories high, to accommodate eleven glass-lined tanks and nine wooden fermenters. Cost when completed, $100,000. Also placed an order for a hundred-barrel pasteurizer."

"January, 1914. Seattle Brewing & Malting Company reported they have plans drawn for four-story building to be used by its cooperage department and bottling plant."

"February, 1914. North Yakima Brewing & Malting Company will spend a considerable sum of money in increasing capacity and otherwise improving its plant."

"April, 1914. Seattle Brewing & Malting Company has installed a new 350-barrel copper kettle with rotating heating coil, Newmark equipment, 350 barrel capacity, and a hop strainer."

(Testimony of Cornelius G. Weber.)

"Independent Brewing Company, Seattle, has been making some improvements in its brewery, in which they will install a large filter and pump."

"July, 1914. Seattle Brewing & Malting Company purchased two parcels of land 30x160 feet. It is expected that the company will add to its building."

"Pacific Brewing & Malting Company has some work."

That finishes what I have got in here, and Washington, [194] there is a whole lot more in there.

Oregon: May, 1912; August, 1913; January, 1913. There are three items there.

California.

"January, 1912. English Ale Brewing Company, Los Angeles, incorporated for $50,000."

"Perrin-Knos Brewing Company, Martinez, recently organized to erect a new brewery to cost $50,000."

"April, 1912. Bay City Brewing Company, San Diego. There is a picture in the 'Western Brewer,' and descriptive article in the April issue showing the new 30,000 barrel brewery of the company to be ready for operation January 1, 1913. Plant to have 150-barrel kettle."

"July, 1912. Ackerman Brewing Company, San Francisco, will erect a new brewery."

"August, 1912. Maier Brewing Company, Los Angeles, has acquired a creamery plant adjoining its plant, and will reconstruct it as a bottling house, cold storage and stable."

(Testimony of Cornelius G. Weber.)

"September, 1912. Golden West Brewing Company, Oakland. Picture and descriptive article on page 124, of new 40,000 barrel brewery."

"Bakersfield Brewing Company and Union Brewing Company are making some changes and additions."

"October, 1912. Jackson Brewing Company, San Francisco, is greatly improving its plant. Malt House will be [195] enlarged and a new brew house, storage cellar, power plant, garage and office will be erected. A complete bottling plant with a capacity of 150 barrels a day will be added.

"Bay City Brewing Company, San Diego, is under roof, and installation of equipment has commenced. It has a good-sized brewery right in the midst of construction there."

"June, 1913. United Consumers Brewing Company, San Francisco, a new $1,500,000 corporation."

"October, 1913. Mathies Brewing Company, Los Angeles, ordered twenty-four 245-barrel glass-lined tanks and sixteen 136-barrel fermenters."

"November, 1913. Mathies Brewing Company, Los Angeles, will make alterations and erect an addition to its plant. Cost, $24,000."

"December, 1913. Maier Brewing Company, Los Angeles, commenced construction work on its new fireproof brew house. Estimated cost, $100,000."

Montana.

"June, 1912. Billings Brewing Company will erect a branch plant at Roundup, cost, $75,000."

"April. Montana Brewing Company, Great Falls,

will erect new bottling house, install a new mash machine, 150 barrel mash tub, and an ice machine."

Idaho.

"April, 1912. Sunset Brewing Company, Wallace, has [196] put its first brew on the market made in its new plant which was built to take the place of the old brewery which was destroyed by forest fires in August, 1910. The plant represents an expenditure of $75,000, and is much larger than the old one. The brew kettle has a capacity of 100 barrels.

"Coeur d'Alene Brewing Company plant of the defunct Coeur d'Alene Brewing Company, closed for about two years, was sold to A. Fisher of Spokane, Washington, for $125,000. $40,000 is to be spent for improvements, including a 100-ton ice machine and complete bottling department."

Colorado.

"Walter Brewing Company, Pueblo, will erect a new stock house, a new office building, and will otherwise improve the plant. Total cost $150,000."

Wyoming.

"October, 1912. The Casper Brewing Company is rapidly completing th erection of its complete new brewery, which is estimated would cost about $80,000."

"May, 1912. Anheuser-Busch Brewing Association of St. Louis, Missouri, will improve its Salt Lake City branch by the erection of an additional building to be used as bottle department and storage house."

"August, 1912. Lemp Brewing Company of St.

(Testimony of Cornelius G. Weber.)

Louis, Missouri, will build a branch bottling and distributing plant at Salt Lake City. Cost, $75,000."

Nevada.

"January, 1913. Carson City Brewing Company is enlarging its plant. The brew house is being thoroughly renovated, and new machinery is being added. The power plant is being improved, and a bottling department will be installed."

South Dakota.

By Mr. Mackay:

Q. Mr. Weber, I hate to interrupt you, but don't you think you could summarize the rest without going into all the rest of it?

A. Just let me read two more items.

Q. All right.

A. "Sioux Falls, South Dakota, new $500,000 brewery is to be erected in Sioux Falls."

There is one more here.

Wisconsin.

> "August, 1912. The William Rahr Sons Company, Manitowish. Illustrative descriptive article relating to addition to malt house representing 2,200,000 bushels increased capacity, to make a total capacity of 4,200,000 bushels per annum."

Then I have here a list of newly incorporated breweries, but it is very voluminous, all of this stuff. You could go on for a whole day if you read all the items. [198]

There are some heavy commitments, and presum-

(Testimony of Cornelius G. Weber.)

ably backers must have subscribed to some of these things. Irrespective of the controversy, it seems to me that the people closest to this thing, and who were spending their good money, definitely did not believe in the early coming of prohibition. Furthermore, if they were ready and willing to spend their money for physical property, I think it is quite reasonable to think that those same people would have been in the market for buying good will or buying a good business. The market is right there, irrespective of what one side of the controversy thought in contrast to what the other side thought, and personally, I am very much convinced that you could not any more read prohibition was in the offing than we could read in the fall of 1941 that we were going to fight Japan. We had warnings. I recall that Kaltenborn (I am sure he was one of them) a year or two before said that some day we would fight Japan. It came in a hurry. Neville Chamberlain predicted "peace in our time." He was wrong. War followed soon after.

Q. Mr. Weber, is it your opinion that prohibition was not in the offing, then, in January?

A. That is my conclusion from this, that the industry had a very favorable outlook, because it just had been going on, and that is the conclusion.

Q. Mr. Weber, you made an investigation. Will you [199] tell the Court what was the total outlay that the Seattle Brewing & Malting Company had made in 1913 and '14 in respect to plant expansion and equipment? A. Yes. I have that.

(Testimony of Cornelius G. Weber.)

During the year ended June, 1913, the company spent $224,783.63, and in the following year, $167,-217.81, or a total of $392,001.44 in plant expansion.

Q. Did that increase their capacity? Do you know how much?

A. Well, I would judge that it might have increased, that is, increased their brewing capacity about fifty per cent, and with the stock cellars brought into balance, it probably would have increased the plant capacity about fifty per cent.

Q. I think you covered the prohibition factor sufficiently there, Mr. Weber.

What other factors did you take into consideration?

A. Well, the outlook for the Seattle Brewing & Malting Company. From the time they started, they had a most favorable record of gross and earnings. That could be traced by years. I have the figures, but picking it up even just during the short period before 1913, '08, '09, '10, '11 and '12, during that period the sales in barrels total were as follows, to even barrels, not including fractions:

1908, 260,803; 1909, 245,190; 1910, 266,135; 1911, [200] 289,570; 1912, 309,811.

The dollar sales, the even dollars, were as follows:

1908, $2,169,353; 1909, $2,091,570; 1910, $2,321,-822; 1911, $2,596,459; 1912, $2,873,603.

Q. May I interrupt here, Mr. Weber?

You were furnished, were you, the balance sheets of the Seattle Brewing & Malting Company for a period? A. I was.

(Testimony of Cornelius G. Weber.)

Q. I call your attention to Exhibit 13, and will ask you if that is a copy of the exhibit that you had seen.

A. Well, some of the basic figures there are so familiar to me now that I don't know if it is necessary to make much of a check there. I can see pretty well that it is the same thing.

Q. May I put it this way?

With respect to the balance sheet profit and loss statement from which you took the figures given by you—— A. That is the same thing, I am sure.

Q. It is? A. Yes.

Q. You can say the same thing with respect to the profit and loss statement here, Exhibit 14?

A. If these are the same ones that I looked at with Mr. Bennion a minute ago, they are the same things.

Q. And also the statement of loss, which is Exhibit 13, [201] the one Mr. Bennion showed you? You checked them before the Court came in?

A. Yes, sir. Those are the ones.

Q. And also Exhibit 7. I think you checked that also. You furnished that one, didn't you?

A. Those are the same ones as these (indicating documents).

Q. And the comparisons given in those, the barrels that you have read here, the comparisons given in those that you read are the same as these here?

A. Yes.

Q. All right. Go ahead.

A. Now, in the country in general, the United

(Testimony of Cornelius G. Weber.)

States, beer production has gone forward almost unbrokenly from 1863, the first year for which records were available, until 1913, and the production of beer per capita had gone from roughly a sixth of a barrel per capita to about two-thirds of a barrel. In chart form, the population trend in the United States and the beer production trend would be as indicated by a chart which I have prepared.

The Seattle Brewing & Malting Company, by comparison with the output of beer in the State of Washington, that is, all the beer produced by the State of Washington, represented the following approximate percentages of the total during the years 1908 to '13, inclusive. [202]

1908, 29½ per cent; 1909, 28.7 per cent; 1910, 31½ per cent; 1911, 33 per cent, 1912, 36.2 per cent, and 1913, 39½ per cent.

So that, in comparison to other breweries it was capturing more trade than the other breweries in the State of Washington.

They had another favorable trend. In the brewing business now, as back in 1913, it was more profitable to sell bottled beer than to sell keg beer, and every brewer was endeavoring to sell as much bottled beer as possible and increase the ratio of bottled beer to total output. So, the percentage of bottled beer to total sales was as follows, in barrels:

In 1908, 10.6 per cent; 1909, 11.3 per cent; 1910, 12.6 per cent; 1911, 14.5 per cent; 1912, 17.5 per cent.

In dollars, it was as follows:

In 1908, 30.8 per cent; 1909, 26.9 per cent; 1910,

(Testimony of Cornelius G. Weber.)

29.4 per cent; 1911, 33 per cent, and 1912, 37.8 per cent.

Then, the net profit per barrel went up during that time. I had better give it by years.

Net profit on keg beer:

1908, $1.06; 1909, $1.00; 1910, $.85; 1911, $.85; 1912, $.94.

Bottle beer:

1908, $4.45; 1909, $4.22; 1910, $4.27; 1911, $4.58; [203] 1912, $4.15.

Weighted average:

1908, $1.42; 1909, $1.36; 1910, $1.28; 1911, $1.39; 1912, $1.50.

Those trends were all favorable, profits were favorable, the brewery was in very favorable condition to meet almost any price wars, or anything. In fact, it had grown to be the biggest institution of its kind west of the Rocky Mountains, and my conclusion is, definitely were in a very favorable position.

So, we come now to another matter, the sales and profits in the State of Washington as compared to outside business. The business in the State of Washington you might call a "close to home" territory, of course, and that usually is the most desirable business. It can be watched better, and is largely conducted with the retailer instead of through far-away agencies, and so forth, and it is therefore the cream of the trade. It was so in this case, as it is in most other cases. The result is that the price received per barrel for beer in Washington was on

(Testimony of Cornelius G. Weber.)

a materially higher level than the price received from outside of the State.

While the sales costs in Washington were somewhat higher on account of being largely retail, directly to the retailers, the margin in Washington was considerably greater than outside of the State of Washington. The prices received [204] per barrel for beer during 1908 and 1912 were as follows:

I have this tabulated across this way (indicating on document), "Washington" and then "Other" and then "Averages."

Is it practicable for me to give it that way?

The Reporter: Yes, certainly.

The Witness: This would be in line then.

	"Washington	Outside of Washington	Weighted Average Price Received
"1908	$9.03	$7.13	$8.32
1909	9.36	6.92	8.53
1910	9.68	6.97	8.72
1911	10.18	7.03	8.97
1912	10.80	7.37	9.28"

Then we come to the net profit per barrel. I had, from the exhibits, the gross profits per barrel from within and without the State of Washington. As a practical man in the business, I think I am able to make a proper allocation of the administrative and selling expenses as between within Washington and outside of Washington.

Ordinarily, in delivering bottled beer, bottled beer takes up more space than keg beer, which would work against it from the selling standpoint—or, the

(Testimony of Cornelius G. Weber.)

delivery standpoint, I mean. But, it was much easier to sell bottled beer back at that time than it was to sell keg beer, less sales resistance. Furthermore, in warm weather, long deliveries of keg beer required icing, which would work against [205] that.

So, when all of these factors are measured one against the other, it is my belief that the selling and administrative costs per barrel were just about the same thing, and for all practical purposes can be figured the same. Therefore, it is just a matter of deducting the selling and administrative costs from the gross profits on the same basis, and I arrive at the following net profits per barrel.

From beer sold within the State of Washington:

1908, $1.804; 1909, $1.846; 1910, $1.757; 1911, $1.834; 1912, $2.057.

Outside of Washington:

1908, $.791; 1909, $.435; 1910, $.407; 1911, $.685; 1912, $.807.

The weighted average was:

1908, $1.422; 1909, $1.365; 1910, $1.283; 1911, $1.393; 1912, $1.501.

That brings us to the profits that were made on a unit basis from within and without the State of Washington, and it is very evident that the bulk of the profit came from the "cream" or local business.

The matter of how much investment was required to produce these profits, I have taken from these exhibits the figures of net worth as represented by capital and surplus, [206] but these balance sheets

(Testimony of Cornelius G. Weber.)

show certain items of good will and organization expense, and inasmuch as the purpose here is to estimate a value for good will, I have eliminated that item from the balance sheet for analysis purposes in order to obtain an idea or a figure of the book net worth of the tangible assets.

In addition to organization expense and good will on the balance sheet, there were items of investment from which was separate income, which I have eliminated in order to bring the figures to represent purely the net worth of the tangible assets devoted to beer sales, and I have arrived at an adjusted net worth as follows:

The year 1908, $2,338,567.43; 1909, $2,466,144.21; 1910, $2,558,439.20; 1911, $2,734,916.97; 1912, $2,903,028.06.

Here has been a growth of net property invested in the business, and it also has been a growth of sales and a growth of profits.

In the case of a business in which there is not very much growth, or it is up and down and up and down, one is often justified in looking at five-year average results more or less in the abstract sense, as so many dollars of profit by years, but in the case of a growing enterprise or a falling or declining enterprise, I believe it is more indicative of a trend to measure the net profit against the net investment, because that really defines the progress that [207] has been made.

To illustrate the point further, just assume for the sake of argument that a company earned $100,00

(Testimony of Cornelius G. Weber.)

five years ago, $80,000 four years ago, $60,000 three years ago, $40,000 two years ago, $20,000 one year ago—or, the last year, rather. The average would be $60,000.

Assume there were another company that made $20,000 five years ago then $40,000, then $60,000, then $80,000 and then $100,000. The average would also be $60,000.

It seems very obvious that you would not treat those two averages alike and say, "Well, here are two companies. They have each made $60,000," and therefore value them the same.

So therefore, measuring the profit against net worth as adjusted, here are the figures:

1908, 15.09 per cent; 1909, 13.58 per cent; 1910, 13.38 per cent; 1911, 14.75 per cent; 1912, 5.98 per cent.

There is a fair degree of uniformity. There are some slight variations over that entire period, and a very decided upward trend in the last three years.

We are concerned here with the good will in the State of Washington. It therefore becomes a matter of determining what percentage of the net assets are reasonably assignable to the State of Washington, because it would have been entirely practicable, if anybody would have made an [208] attractive proposition to buy the good will in Washington, to make arrangements to get the beer brewed right in

(Testimony of Cornelius G. Weber.)

the same brewery. As a matter of fact, in our own little plant we had an arrangement of just that kind. A private individual wanted beer under his own name and under his own labels. He sent us the labels. We made a deal with him, made beer for him, and he sold the beer under his own label.

So therefore, the assets, the tangible assets assignable to the business in Washington would not be the entire brewery property, but only such portion as would be required to produce the beer sold in that State and Alaska.

I have taken from the balance sheets and the other relevant exhibits for the property in Washington, and I know from experience that the brewery plant itself would be allocable on the basis of barrels sold. Irrespective of the price you receive, the amount of tangible fixed property assignable to that business would be on a barrel basis. Inventory and accounts payable would be on a similar basis, because the inventory is controlled by the barrel output, and the accounts payable and accruals are on a barrel output. Accounts receivable, they are on a dollar basis, so I have allocated them on a dollar basis.

Then, adding these all up, I get that for the fiscal year ended in 1912, June 30th, that the total net assets assignable to the business in Washington would be $1,691,368. [209]

I had considered, however, another factor which was based on a somewhat different premise, that is, if the brewery itself had been down to the size for

(Testimony of Cornelius G. Weber.)

the business in the State of Washington, and in that connection had assumed that a smaller brewery would cost somewhat more per barrel, and instead of using $1,691,368, I have used the round sum figure of $1,750,000 as the net tangible assets assignable to the business in Washington.

For the production of profits as they then existed —and I will restate here: I don't believe I have stated them at all—the net profits and the tangible assets assignable to such profits over the period 1908 to 1912, are as follows:

1908. Net tangible assets, $1,550,000. Net profit from the State of Washington, $293,353.43.

1909. Net tangible assets, $1,710,000. Net profit, State of Washington, $298,387.90.

1910. Net tangible assets, $1,712,500. Net profit, $303,160.48.

1911. Net tangible assets, $1,735,000. Net profit from the State of Washington, $326,880.82.

1912. Net tangible assets, $1,750,000. Net profit from the State of Washington, $353,693.04.

The net profits to the net tangible assets for this [210] period are then as follows:

1908, 18.9 per cent; 1909, 17.57 per cent; 1910, 17.67 per cent; 1911, 18.85 per cent; 1912, 20.12 per cent.

From the above and other indications from this expanding and evermore profitable company, I firmly believe that currently and prospectively one would conservatively figure that they had reached a status such that they could expect a 20 per cent re-

(Testimony of Cornelius G. Weber.)

turn on $1,750,000 of net tangible assets assignable to the State of Washington, or a profit of $350,000 a year.

Under an average condition, if they had looked into the future, which would mean it is up one year, down a little bit, and up, but the steadiness with which this thing has gone and built up—well, as a matter of fact, I searched in Moody's and Poor's Manuals of Industrials in '13, '14, '12, and in there there are a good many brewery statistics listed, and I have found nothing comparable. Even a big brewery like Pabst Brewing Company in Milwaukee, which was expanding at that time, none of those breweries were making 6 per cent on their tangible investment, and a good many were down; and I made a very, very careful search. The big ones all had of course big investments, and the dollar profits were substantial figures, but against the investments there was just nothing that I could find that compares with this situation. If there are any, they are not published, but [211] they were just not to be found.

So—well, I am inclined to believe that this is a unique situation which was developed here by the Seattle Brewing & Malting Company, and I can believe, from the fact that they have gotten prizes at World's Fairs, which after all, isn't a small thing —you just can't make any old thing and get a prize—I think that all of those factors put together made for a very, very favorable situation.

(Testimony of Cornelius G. Weber.)

So, that is my general conclusion as to the status that they had reached.

By Mr. Mackay:

Q. Mr. Weber, having determined your so-called "net worth" and your prospective earnings, what did you do then?

A. I also gave some consideration to what would have been a reasonable royalty at that time if anybody could have gone and taken this on a royalty basis. A profit of $1 to $1.25 a barrel in those days was considered very good, and at the present time is a pretty good profit because when you make a profit of from $1 to $1.25, you pay a fair return, as a rule, on your tangible assets.

Now, if these people reach a status where they are making $2 a barrel in the State of Washington, even if I would take the upper limit of $1.25, $.75 a barrel, the same amount that they started off with in 1940, would be quite a consistent royalty basis back in 1913, because here was the [212] $2, and if you are going to make $1, $1.25, you could, for that kind of business, pay $.75 a barrel royalty and come out in good shape.

So, I had considered that that would pretty well tie up with 1913, just about the same situation as they had later in 1914.

Then of course I considered that if 172,000 barrels a year, which is about what they sold in Washington, the status they had attained in 1913, that were sold on a royalty basis of $.75—I mean, a roy-

(Testimony of Cornelius G. Weber.)

alty of $129,000 a year, that would be a mean royalty.

So, from all of these foregoing and other considerations, I made an estimate of the value of the good will of the Seattle Brewing & Malting Company as of March 1, 1913.

Q. What in your opinion was a fair market value of March 1, 1913, for good will inherent in the trade name "Rainier" as then associated with the products of Seattle Brewing & Malting Company as sold in the State of Washington and Territory of Alaska?

Mr. Neblett: Your Honor please, that question is objected to on the ground it does not include the necessary facts on which to base a hypothetical opinion. There is nothing here to show that this witness knows what was included in the so-called "good will" of Seattle Brewing & Malting Company as of March 1, 1913. [213]

Mr. Mackay: If your Honor please——

The Court: Mr. Mackay, I am going to sustain the objection, and ask you, if you can, to ask the usual question. I expect you wanted to save time.

Mr. Mackay: Yes, I did.

The Court: The question is usually asked in a different form.

Mr. Mackay: Yes, I appreciate that. I will reframe the question.

By Mr. Mackay:

Q. Mr. Weber, taking into consideration the balance sheets of the Seattle Brewing & Malting

(Testimony of Cornelius G. Weber.)

Company for the period from 1908 to 1912, ending June 30th, in each one of those years, and also the income and profit statements of the company, the outlook for the industry in general, and all the other factors that you have taken into consideration here, that you have talked about, have you an opinion as to the March 1, 1913, value of the trade name "Rainier" in the State of Washington.

A. I have an opinion.

Mr. Mackay: If your Honor please, may we take a little recess? There is one part of the pleadings I want to study and call your Honor's attention to.

The Court: I have them before me right now.

All right, we will take a short recess. [214]

(Short recess.)

Mr. Mackay: I would like to withdraw the last two questions, if your Honor please.

By Mr. Mackay:

Q. Mr. Weber, I think that you have stated that you arrived at a net worth of $1,750,000 for the State of Washington and the Territory of Alaska at March 1, 1913? A. Yes, I did.

Q. And that the earning capacity of the company at that time was about $350,000?

A. That's right.

Q. In arriving at your value, what did you do from there?

A. Well, the first thing I did, the first test I made was to see about what would be a profit that

(Testimony of Cornelius G. Weber.)

would reasonably satisfy $1,750,000 of tangible assets, and I believe that 10 per cent on tangible assets, especially in view of the fact that no breweries that I could find were earning any such percentage, yet were expanding and building, that that would be a very conservative figure. That would mean that $175,000 a year of earnings would be necessary to satisfy the tangible assets assignable to the State of Washington and Territory of Alaska. Deducting that from $350,000 leaves $175,000 in excess of the amount necessary to satisfy the tangible assets. [215]

Then I considered the capitalization rate of 16 2/3 per cent, or a multiplier of 6, would be fairly indicative of what you could assign to the good will in this trade name as associated with the product, and multiplied $175,000 by 6, and I get $1,050,000 as one indicator.

I next made a rather extensive study of stocks that were selling back in 1913, stocks reflected as good will in certain companies.

Mr. Neblett: Your Honor please, at this point could I ask the witness a question just to clear up the record?

You gave the figure "$1,050,000." What was that figure supposed to represent, Mr. Weber?

The Witness: Well, that is one figure that I am considering in arriving at my conclusion. That is, it is one test as to where that value might reasonably strike, or in the neighborhood of what figure it might reasonably strike.

(Testimony of Cornelius G. Weber.)

Mr. Neblett: Your Honor please, what I am trying to determine, that answer would not show an opinion with respect to the value of the good will, was it or not?

The Witness: Well, it is close to the opinion, but not the final round opinion that I have formed.

Mr. Neblett: Your Honor please, respondent moves to strike the testimony. We could not anticipate that answer or that conclusion from what he previously said, and as I understand [216] it, the motion to strike is equivalent to an objection. The witness has not shown himself qualified to answer any hypothetical question based on all the testimony in this case.

As I understand it, a hypothetical question must assume the truth of the evidence in the record, and it must be based on all the testimony in the case. There is nothing here to show that this witness is at all familiar with the various factors of this case at this point. Furthermore, there is no showing as to what part of the witness' total value of good will is attributable to the State of Washington and the Territory of Alaska. There is no basis or showing as to the witness' allocation of tangible assets and net profits devoted to the business in the State of Washington and the Territory of Alaska, either of which, your Honor, is fatal to a hypothetical question.

Mr. Mackay: If your Honor please, as I view it, the hypothetical question just based upon all the evidence in the record is objectionable. The witness

(Testimony of Cornelius G. Weber.)

has taken a long time here to show what he has done in his investigation, how he arrived at what he has taken into consideration, which has been based upon the financial records which are in the record. It seems to me that he ought to be permitted to testify from these things which he has already identified. He has already told your Honor with respect to the balance [217] sheets, which are Exhibit 13, for the years 1907 to 1912, and also the statement of income and earned surplus for the same period, which is Exhibit 14, and also Exhibit 15, which is the statement of sales costs of goods and gross profit on sales for the years ended 1908 to 1912, and all afternoon he has been saying that, based upon these, he has arrived at his values. It seems to me the witness ought to be able to testify at least upon the conditions of things he has testified to he has come to that value. If we haven't sufficient in there, of course that is our outlook, but I was very careful to have him, as he went along here, state what investigation he made, what information he found in arriving at that value, and I think it is quite proper for the witness now, having testified that way and showing the factors he took into consideration, to give an opinion as to the fair market value upon those factors he did take into consideration.

The Court: My understanding is that the witness has made a very extensive analysis, in accordance with his own method; and it has been extensive, there isn't any question about that. However, he appears to have been basing his opinion very

(Testimony of Cornelius G. Weber.)

largely upon an analysis of the balance sheets and the earnings record of the business before and at the time of the date of valuation.

I understood the witness to say that he allocated [218] assets of the entire business to what he called the "Washington business," and that he arrived at a figure which he was using in his method of finally coming to the value that is to be determined, he had used the figure of $1,750,000 as the value of net tangible assets assignable to the business in Washington.

Isn't that correct?

The Witness: That's correct, yes.

The Court: And the figure was $1,750,000.

The Witness: Allocated to Washington.

The Court: Then I understood the witness to say that it is his opinion that the value of the good will of the business is large, and that it almost approximates the value of the business' going business. That part of his testimony I think he has not finished, and that part of his testimony is not clear.

I thought that the witness was at this point going to explain now his method in arriving at the fair market value of good will.

Mr. Mackay: Yes, that is what I wanted him to bring out.

The Court: I think that I must deny the motion to strike, but I do think, Mr. Mackay, that you could assist the witness in pointing up his testimony at this point, because we listened to all of this very carefully, to his long dissertation [219] and his

(Testimony of Cornelius G. Weber.)

detailed dissertation, and I myself do not know where the witness is going. I think you certainly should ask him a question which he can either express an opinion on now, and then explain it, or you perhaps should ask him a question which will at least, for the record, summarize the elements that he was asked to consider, which I understand he has considered, and which I think the record will show he has considered.

I think the form of a hypothetical question is a good form, because it does summarize the elements that the witness has been asked to give his chief attention to.

Mr. Mackay: Thank you, your Honor. I shall do that.

By Mr. Mackay:

Q. Mr. Weber, you have stated that you had assigned a net worth, I think, a value of tangibles to the State of Washington of $1,750,000. Did I understand you properly? A. That's right.

Q. Was that determination or assignment that you made based upon the three exhibits you now have, which are 13, 14 and——

A. There is another exhibit.

Q. ——13, 14 and 15?

A. I think there is another exhibit, the one that shows the allocation of property. [220]

Q. Oh, yes. Exhibit 27.

A. Yes. On this here (indicating on exhibit).

(Testimony of Cornelius G. Weber.)

Q. You are speaking about Exhibit 27, are you not?

A. That's right, Exhibit 27, and Exhibit 13, Exhibit 14 and Exhibit 15, yes, sir.

Q. So, all your values of three and seven, the figures one and three million and fifty thousand were taken from the record? A. Yes.

The Court: What was the total figure of the whole business that would compare to your figure of $1,750,000?

The Witness: After the elimination of investments and the item of good will and organization expense, the adjusted net worth at 1912 would be $2,903,028.06, and out of that amount I have allocated $1,750,000 to the business emenating from the State of Washington and the Territory of Alaska.

The Court: Has the witness yet expressed an opinion as to the fair market value on March 1, 1913, of the good will of the business in the State of Washington and Alaska?

Mr. Mackay: Not yet. That is what I was just coming to, your Honor.

The Court: For the entire business, was good will carried on the books as an asset? [221]

The Witness: It was carried as an asset.

The Court: Those balance sheets that you have, I suppose they give you a figure as of the end of the accounting period for 1912. Were they on a calendar year basis?

The Witness: It is on a fiscal year basis; June

(Testimony of Cornelius G. Weber.)

30, 1912. That was the last one previous to the basic date.

Mr. Mackay: I might state, your Honor, there is an exhibit here which shows that for 1911—we are coming to his figures, anyway. Withdraw that.

By Mr. Mackay:

Q. Mr. Weber, you have testified that you made an investigation to determine the fair market value at March 1, 1913, of the good will inherent in the trade name "Rainier," as then associated with the products of the Seattle Brewing & Malting Company, and sold in the State of Washington, Territory of Alaska? A. Yes, sir.

Q. I think you have also stated that you took as your basic information the financial records of the company, which have been put in here in evidence as exhibits. You have gone over that twice now, and we know in the record what the numbers of those exhibits are.

From those financial statements and records, you have made certain deductions and arrived at a net worth of tangible assets in the State of Washington of $1,750,000. [222] A. That's right.

Q. You have also testified that you have taken into consideration the conditions as you found them to exist in 1913 with respect to the prospects of prohibition or other factors that may have had an adverse effect upon the brewery industry in the State of Washington, and that you also have taken into consideration the business trends at that particular

(Testimony of Cornelius G. Weber.)

time, in particular the trends of the business of the Seattle Brewing & Malting Company.

Now, taking all those things into consideration, Mr. Weber, what in your opinion was the fair market value at March 1, 1913, of the good will inherent in the trade name "Rainier" as then associated with the products of Seattle Brewing & Malting Company as sold in the State of Washington and Territory of Alaska?

Mr. Neblett: Your Honor please, the question is objected to, and the form of the question is objected to in addition to its content. A hypothetical question, your Honor, is supposed to give the opposing counsel something to attack, to see precisely what the witness based his conclusion on, the factors that he took into consideration.

At this stage of the proceeding, your Honor, we are not in a position to do that based on the hypothetical question when that has just been asked this witness. As a matter of fact, your Honor, Mr. Wigmore says that a hypothetical [223] question is such a confusing question that it is sometimes a good policy for counsel propounding the hypothetical question to write it out in advance and submit it to the opposing counsel for consideration, which is a very fine thing to do. Then it obviates confusion.

We say that the witness has not shown what is the basis on which the allocation is made for the State of Washington and Territory of Alaska. After all, what is he valuing? We don't know at this stage of the proceeding what the witness is

(Testimony of Cornelius G. Weber.)

valuing as far as the State of Washington and the Territory of Alaska are concerned.

The Court: The witness has explained the steps that he followed in such detail that it has been hard to keep in mind everything that he has said, but I believe he testified that he made an analysis of the earnings of the business and the sales in the State of Washington, and that on the basis of the volume of business done in the State of Washington, he arrived at a percentage or a ratio which he thought was fair to apply in allocating tangible assets to the State of Washington as his first step in forming his opinion as to the fair market value of good will in the business in the State of Washington.

So I think, Mr. Neblett, that I don't quite understand your objection. Mr. Mackay did not resort to the hypothetical question. If he had done that, he would have [224] propounded a long hypothetical question to the witness at the beginning of his testimony, and the witness would have immediately expressed his opinion, and then, as is customary in these cases, counsel for respondent would have objected and possibly would have said that he objected as to the qualifications of the witness. But, he would have made practically the same objection then as he is making now.

I have never yet heard counsel in tax cases accept either the question or the testimony of the expert as being free from fault. That apparently is part of our own system in the trial of cases to establish a value that has been proved. However that may be,

(Testimony of Cornelius G. Weber.)

the method Mr. Mackay has followed, as I understand it, is to ask the witness first to state what analysis he made in preparation for forming his own opinion as to the fair market value of the good will, and the witness has taken us step by step to the point where he is now going to express his opinion. I think that procedure is usually preferable to the other one of preparing the long hypothetical question and then having the witness backtrack and explain how he arrived at his opinion.

It seems to me that the evidence which is represented by the exhibits, the numbers of which have just recently been stated for the record, is the main evidence now [225] in the record which this witness certainly would have to consider.

Is it part of your objection that the witness has not considered the evidence now in the record fully, or have you in mind some evidence that he should have considered?

We have a great many exhibits. We have twenty-nine exhibits, and as I recall the nature of those exhibits, there are a great many of them that this witness won't have to take into consideration in arriving at his opinion.

Mr. Neblett: For example, your Honor, Exhibit 24, to be specific, says "Net Tangible Assets, 1912, $2,903,028.06."

The Court: That is for the whole business.

Mr. Neblett: Yes. What is the basis on which the allocation is made?

The Court: I think I have been following the

(Testimony of Cornelius G. Weber.)

testimony clearly. I think I know the basis on which the allocation was made.

Let me ask the witness as best he can if he will just clear this point up for us. But, Mr. Weber, please do not repeat your testimony. It would take too long.

How did you make your allocation of tangible assets in the business assignment made to the business in Washington which resulted in your figure of $1,750,000?

The Witness: I took the ratio, the percentage [226] ratio of the number of barrels sold in Washington to the total, and I distributed the fixed assets, the accounts payable and the inventory on that basis.

The Court: Have you your working figures there? What percentage did you use? We have a total figure.

The Witness: It was 55.5 per cent basically, and as I think I explained, later I rounded out the figure and increased it from the purely mathematical number of a million six hundred and ninety-odd thousand that developed, and it is in one of these exhibits. This would be part of it. It would be the brewery company.

The Court: You are now referring to what exhibit?

The Witness: I am referring to Exhibit No. 27, from which I took the property in the State of Washington, the fixed property.

The Court: One difficulty that we are having,

(Testimony of Cornelius G. Weber.)

Mr. Weber, is that it would be very much better if you would take a pad of paper and a pencil, and if you would take the figure, which I believe is $2,903,028, and just tell us what items go to make up that figure. Then, if you please, take your percentage of 55.5 and for the purposes of the record simply say to us that $1,750,000 is 55.5 per cent of another figure, but first tell us what goes to make up that master figure or total figure that you are using. We want your explanation to be more in the nature of giving us a mathematical computation [227] than to tell us how you have rationalized what you have done.

Do I make myself clear?

The Witness: You do.

The Court: I know you want to be helpful to us, and we want to be sure that we understand what your method is.

All right, then. Will you do that, please?

The Witness: I think I have it right before me, your Honor. I think I can give it off of this here (indicating document) if you will permit me to——

The Court: I think it is going to help you if you do it as I suggested. You may not like to do that, but I am going to ask you to take——

The Witness: I would have to take practically all of this here, because it is on two different bases, part on sales and part on barrels.

The Court: We are going to have to get through this, anyway. You have before you a schedule which is the same as what exhibit?

(Testimony of Cornelius G. Weber.)

The Witness: It is the taking of——

The Court: No, you have a photostatic copy of a piece of paper over there. What is that? Are you going to be relying on that?

The Witness: That is Exhibit 27, which I have used as the basis for allocating the fixed assets. [228]

The Court: I understand that, and you have told us that two or three times. Now, what is that typewritten schedule here? What exhibit is that?

The Witness: That is my own exhibit, and I don't believe that is in the record.

The Court: That is part of our trouble, Mr. Weber. We cannot have you testifying from your own schedules. We have to have your testimony tied up with the schedules that are in evidence. You have been shown several schedules in evidence. If you are using something that in your notebook is called "Exhibit E," what is it called in the record in this case?

The Witness: It is in 13, 14, 15 and 27. This is a composite that is made——

The Court: You made up a schedule, then, bringing together four exhibits in this case, is that correct?

The Witness: That's right, to arrive at this figure which has to be made compositely from——

The Court: How many years are you taking into consideration? You should not be taking into consideration more than one year in making this allocation of tangible assets to the business in Wash-

(Testimony of Cornelius G. Weber.)

ington. What year are you taking into consideration?

The Witness: The last year, 1912.

The Court: 1912? [229]

The Witness: Yes. I have done it for the other years, but merely as to a test.

The Court: Am I correct in understanding that you used a figure of $2,903,028 as the base figure? Did you so testify?

The Witness: That is the base figure for all the tangible assets.

The Court: Is that the figure to which you applied the percentage of 55.5 per cent, or it is not?

The Witness: No, I did not.

The Court: Now, without saying one word into the record, even if it takes you ten minutes to do it, I want you to write on that pad of paper the figure to which you applied the 55.5 per cent.

(Witness calculating.)

Mr. Mackay: If your Honor please, we have a rather difficult problem here of trying to assign the value to the particular territory. The witness has testified how he has done it, and I have in my hand a photostatic copy of a schedule showing how he arrived at that assignment and allocation. I have talked with counsel, and I think it would clear up the thing and hasten the trial a great deal if this could go in merely for explanatory purposes of the witness' testimony. I am not offering it as to the truth of what is in there, but just as to the explana-

(Testimony of Cornelius G. Weber.)

tion, because [230] it is all based on these other exhibits. I think it would help tremendously if it would go in.

Mr. Neblett: Your Honor please, after all, the witness is on the stand as an expert. Of course, if we give him time he can probably do it, but if he is not able to figure his value out, that certainly does show a deficiency in expertness. He is being tested out right now. Your Honor please, however, as an explanation of his testimony only and for that purpose only, as, you might say, a graphic picturization and how he explains his testimony, we have no objection to this document which Mr. Mackay has just handed me.

The Court: Very well. That is received as Exhibit 30.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 30.)

[Petitioner's Exhibit No. 30 appears in Book of Exhibits.]

The Court: Mr. Weber, had you about finished that computation, or is it too difficult to do now?

The Witness: It is a case of unscrambling eggs and rescrambling them. There are so many factors in there, to first take this apart and piece it together, that I cannot readily give that in a few figures without restudying this thing from another angle. The sequence is all given here and explained, because the total is very properly taken from the

(Testimony of Cornelius G. Weber.)

balance sheet. I started out with that, and it will show [231] the inventory and all the different items that were taken, and the whole process is explained step by step in here.

Now what I am trying to do is to simplify this beyond what I think I can do on here. I think I have already got that in its simplest form. I worked with this quite a bit to try to get this in better shape, but it is a complex thing on account of the way these properties are scattered, some allocated on a barrel basis and some on a dollar basis, and I will not admit that it is not that I don't know what I am doing here. I am. It is merely a case that I am trying to simplify it, and I can't simplify it beyond what is on here, at least, not in quick order.

The Court: Very well. Thank you very much for making an effort to do that.

The Witness: Not at all.

Mr. Mackay: Will you read the last question, please?

(The record was read by the reporter as follows:

"By Mr. Mackay:

"Question: Mr. Weber, you have testified that you made an investigation to determine the fair market value at March 1, 1913, of the good will inherent in the trade name "Rainier," as then associated with the products of the Seattle Brewing & Malting Company, and sold in

(Testimony of Cornelius G. Weber.)

the State of Washington, Territory of Alaska?

"Answer: Yes, sir. [232]

"Question: I think you have also stated that you took as your basic information the financial records of the Company, which have been put in here in evidence as exhibits. You have gone over that twice now, and we know in the record what the numbers of those exhibits are.

"From those financial statements and records, you have made certain deductions and arrived at a net worth of tangible assets in the State of Washington of $1,750,000.

"Answer: That's right.

"Question: You have also testified that you have taken into consideration the conditions as you found them to exist in 1913 with respect to the prospects of prohibition or other factors that may have had an adverse effect upon the brewery industry in the State of Washington, and that you also have taken into consideration the business trends at that particular time, in particular the trends of the business of the Seattle Brewing & Malting Company. Now, taking all those things into consideration, Mr. Weber, what in your opinion was the fair market value at March 1, 1913, of the good will inherent in the trade name "Rainier" as then associated with the products of Seattle Brewing & Malting Company as sold in the State of Washington and Territory of Alaska?")

(Testimony of Cornelius G. Weber.)

Mr. Neblett: I want to object on the basis stated.

The Court: It will not be necessary to state your objection.

Mr. Neblett: We have already stated our reasons.

The Court: Objection overruled. You may answer the question. [233] A. $1,000,000.

Mr. Mackay: Will you take the witness?

Cross Examination

By Mr. Neblett:

Q. Mr. Weber, I believe the effect of your testimony was that the local option reached its high point or maximum about 1911 or '12, or did you testify like that?

A. It had reached its maximum between 1908 and 1914. The exact point I don't think anybody could measure, just exactly the peak of the point in there.

Q. This value of $1,000,000 that you mentioned, for the good will, what would be your value as of March 1, 1914, we will say?

A. I haven't made a study of the value of March 1, 1914. I haven't valued it at that date.

Q. What would be your value as of March 1, 1915?

A. I have made a valuation only as of March 1, 1913, and I could not answer that.

Q. In your opinion would there be any difference between the March 1, 1913 value and the March 1, 1914 value of the good will?

(Testimony of Cornelius G. Weber.)

A. There could be a very substantial difference.

Q. In your opinion, was there a difference?

A. I haven't an opinion as to whether there is a difference. I haven't studied it. I don't know. I have [234] just confined myself to what I was requested to do, March 1, 1913. I have no other valuations.

Q. Let us bring it down a little closer. Let us take March 2, 1913. Would your opinion of the value vary very much?

A. I would say that it would be ridiculous to attempt to make a distinction in value between two days unless some extraordinary thing had occurred, like selling off, buying assets, or——

The Court: We understand. All right.

A. (Continuing): No. I would not think that I would find any difference there.

Q. I just want to get some idea of how you approach a valuation question, Mr. Weber. Suppose we would go to December 31, 1913? What would be your opinion of value?

A. December 31, 1913? I would have to look and analyze the trends and conditions, and see what other developments there had been, to have any opinion. There might be a difference. It might be higher, it might be lower, it might be the same, but I don't know.

Q. Didn't you as an expert, though, find it necessary to check these factors for confirmation or checking purposes subsequent to 1913, just a little bit?

(Testimony of Cornelius G. Weber.)

A. Subsequent to 1913 I checked and found that we had prohibition in the State of Washington in 1914, and that we [235] had national prohibition in 1920. I certainly checked into that, yes, but that is not what I thought was in the picture in 1913. After all, if on December 1, 1941, you had been asked to project a curve of automobile registration into the next five years, I am sure your curve would have been wrong because——

Q. You stick to the beer business, now. We are talking about March 1st.

A. ——unforeseen developments——

Q. Mr. Weber, do you know what the conditions were affecting the brewery business as of December 31, 1913? A. Yes.

Q. Do you know what the conditions affecting the brewery business were as of November 3, 1914?

A. November 3, 1914? Yes.

Q. In what way?

A. That was, I think the day when they voted Washington dry.

Q. They voted Washington dry?

A. I think it was about that date.

Q. What were those conditions just prior to November 3, 1914, that were the conditions of the brewery business on that date?

A. November 3, 1914, did you say?

Q. Yes. [236]

A. Insofar as they were visible, they were not any different from several months before, but that

(Testimony of Cornelius G. Weber.)

they were there and unforeseeable was proven by the subsequent events.

Q. Mr. Weber, I show you a pamphlet entitled "Anti-Saloon League Year Book, 1913," and ask you if you have ever heard of that book before?

A. I looked through a goodly number of anti-saloon books in the library in Seattle, and I believed I looked in that. I am not sure whether I looked through 1913, but I am quite sure I looked through it.

Q. I don't believe you referred to that book in your testimony.

A. I have not referred to that book, but I will say this, that Dr. Colvin mentions in here that very much of his material comes out of those Anti-Saloon League Books. In fact, I have a notation here, if you want for yourself a copy of this here, where he has that notation (indicating document).

Q. I would appreciate your giving me a copy, if you don't mind.

A. I will give you one. I don't want to take the Court's time.

Q. Let it go. Never mind now.

A. I will give it to you.

Q. Mr. Weber, do you know how much area in the State [237] of Washington was under no license, what is called "no license territory" in 1913?

A. I have from Dr. Colvin that there were six counties, and I think in my notes somewhere—I can't take the time now, unless you want to take the time—I think I have the names of the coun-

(Testimony of Cornelius G. Weber.)

ties. Then I would look up the area, but I don't remember the area.

Q. Do you know what the population of the State of Washington was in 1913?

A. I don't recall it right at the moment. I have that in my notes.

Q. All right, you don't recall. Do you know what the urban population of the State of Washington was in 1913?

A. Not from memory, no, I don't.

Q. Do you know what the rural population was?

A. If I don't know the urban, I would not know the rural.

Q. I didn't know unless you told me.

A. You see, I——

Q. Could you name any of the "no license" counties in the State of Washington in 1913?

A. If I can refer to my notes I——

Q. I am just asking you. You are an expert.

A. No. I have six counties dry.

Q. Do you know what percentage of the population was [238] under no license?

A. I know it was a very small percentage. That I know.

Q. Would you say 25 per cent?

A. I would say less.

Q. I call your attention here to this statement: "Population under no license, 42 per cent in the State of Washington." Did I read that correctly?

A. You are reading that correctly, yes.

(Testimony of Cornelius G. Weber.)

Q. Population under licensed territory in the State of Washington. What was that now?

A. That would be the difference.

Q. The difference, 58 per cent? A. Yes.

Q. Do you know the number of people in the State of Washington holding Federal retail liquor tax receipts in 1913? You wouldn't have any idea at all? A. No, I haven't that.

Q. What did the local option law of Washington provide, Mr. Weber, if you know?

A. Well, I don't know the wording of the law exactly, local option. I have interpreted it only in its general form.

Q. Do you know how many elections had been held under the provisions of the law passed in 1909 providing for local [239] option in 1913?

A. I didn't record them, but I read about them.

Q. How many were there?

A. I don't know.

Q. I show you here in this book, where it says: "Thus far 220 elections have been held under the provisions of this law."

Reading further: "140 of these elections have resulted in dry victories, while 80 have resulted in wet victories. As a result of these elections, 572 saloons have been abolished, and 87 per cent of the area of the State has been made dry."

You read this book up in Seattle, didn't you, Mr. Weber?

A. I read a good bit of that book, but it is not

(Testimony of Cornelius G. Weber.)

the information that I have about the amount that is dry in Dr. Colvin.

Q. You read this book up there. Why didn't you come down and tell this Court what you read in it?

A. I can't reconcile six counties with 82 per cent. I just can't.

Q. Reading further:

> "At the present time the unincorporated portion of 34 counties is without saloons, and 6 counties are entirely dry. There are more people living in the dry territory [240] in the State of Washington at the present time than the entire population of the State numbered in 1900. Most of the railroads have discontinued the sale of intoxicating liquors, and the steamboat companies are rapidly following the example of the railroads."

Did you read that up there in Seattle?

A. I saw that map, and the counties it has there, I can't reconcile with those statements.

Q. You saw this map up there?

A. Yes, sir, I saw that map.

Q. Did you have a photostat of it so you could use it down here in your testimony?

A. No, I didn't make a photostat of it.

Mr. Neblett: Your Honor please, we ask that this book be marked for identification.

Mr. Mackay: No objection.

Mr. Neblett: Their statistics are trustworthy!

(Testimony of Cornelius G. Weber.)

The Court: That may be marked for identification as Respondent's Exhibit A.

(The document referred to was marked as Respondent's Exhibit A for identification.)

By Mr. Neblett:

Q. Mr. Weber, I am going to ask you to take Respondent's Exhibit A and describe to the Court the wet and dry territory shown on the map in Respondent's Exhibit A. [241]

A. There is a map here showing the counties in the State of Washington. Part is in white and part is in black. I have not found yet whether the black or the white represents the dry or the wet.

Mr. Neblett: Your Honor, please, I have another book I can give you. It is as of January 1st.

The Court: Mr. Neblett, what is the key to that map?

Mr. Neblett: The key to that is "No License Territory," as I understand.

The Court: Where does it say that? Where is your key?

Mr. Neblett: "Population under no licensed territory, 42 per cent. Population under licensed territory, 58 per cent."

Now, the wet and dry map of Washington, January 28, 1913.

The Court: What is wet and what is dry?

Mr. Neblett: Just a second. I am trying to find the legend on the map.

Your Honor please, the legend says: "As a result

(Testimony of Cornelius G. Weber.)

of these elections, 572 saloons have been abolished, and 87 per cent of the area of the State has been made dry."

So, obviously the white is the dry and the black is the wet. [242]

Is that more or less your understanding of it, Mr. Weber?

The Witness: Could I ask a question, your Honor?

The Court: Yes.

The Witness: This book here, as Dr. Colvin says, is based largely on the Anti-Saloon League Books, and he says in there definitely that up to 1914 the counties had changed from 10 wet to 6 wet, and I cannot by any stretch of imagination reconcile these two things with all of this dry territory in the face of that statement and in the face of what all these breweries were expanding for, with 82 per cent of the State dry. There must be something wrong here somewhere. I just can't follow that.

The Court: Of course it may be that they were selling beer illegally in the State of Washington.

The Witness: I don't know about that.

By Mr. Neblett:

Q. Do you know about that, Mr. Weber?

A. I wouldn't assume that anybody would put good money in the business there in a big way, and then depend on that.

The Court: That has happened.

(Testimony of Cornelius G. Weber.)

Mr. Neblett: It certainly has, your Honor, and will probably continue there.

By Mr. Neblett:

Q. I believe you stated, Mr. Weber, that Mr. Colvin, [243] from whom you quoted rather extensively in your testimony, referred to the Anti-Saloon League figures.

A. Anti-Saloon League Books, yes.

Q. Just to see, Mr. Weber, how this matter progressed, let us take the 1912 Anti-Saloon League Book. We will go in reverse, rather than the other way, and see what the situation was so as to, what you might say "spot a trend."

Mr. Weber, I call your attention to the Anti-Saloon Year Book for 1912, edited by Ernest H. Cherrington. Mr. Cherrington edited it for 1913 also.

Reading from this book:

"The local option for Washington providing for a vote on the liquor question in towns, cities, and the unincorporated portion of the counties as separate units had been in operation since 1909. Thus far 129 elections have been held. 84 of these elections have resulted in dry victories, while 45 have resulted in wet victories. As a result of these elections, 360 saloons have been abolished, and 71 per cent of the area of the State has been made dry."

Do you follow me, Mr. Weber?

A. I follow you, but I can't reconcile it with this.

Q. Then, 87 per cent had been made dry, I be-

(Testimony of Cornelius G. Weber.)

lieve. Is that your recollection of what the '13 Hand Book showed?

A. I am going by his summarization.

Q. I did not ask you that. [244]

A. I don't recall what I read in the '13.

Q. Very well.

> "At the present time the unincorporated portions of 19 counties are without saloons. 4 counties are entirely dry, and 71 municipalities, including 15 county seats, are under no licenses."

I believe you spoke of no license in your testimony in chief. What is meant by "no licensed territory," Mr. Weber?

A. "No licensed territory" means it is dry, in the vernacular, the word "dry".

Q. That is what I want. I want your definition to appear through the vernacular.

Mr. Mackay: I never heard of the "brewery vernacular".

Mr. Neblett: I will take Mr. Weber's word for that.

By Mr. Neblett:

Q. Continuing, Mr. Weber:

> "There are more people living in dry territory in the State of Washington at the present time than the entire population the State numbered in 1900. Most of the railroads have discontinued the sale of intoxicating liquors,

(Testimony of Cornelius G. Weber.)

and the steamboat companies are rapidly following the example of the railroads. Between 1400 and 1500 saloons are operating in [245] all parts of the State. The saloons of Seattle are confined by a city ordinance to a very small portion of the city area.

"One of the most important and far-reaching decisions of the State Supreme Court in recent years is that just handed down in the case of State v. Falkenstein. Falkenstein, as Steward of the steamboat Kennedy, plying between Seattle and Bremerton, conducted a bar on the boat without having a license from the city and county authorities. Twice convicted, he appealed to the Supreme Court, which conviction was affirmed, the Court holding that it was necessary not only to have paid $25 license fee to the State, and a $25 tax to the United States, but also to secure a license from the County Commissioner.

"The significance of this decision will be much more apparent when it is understood that it will compel every steamboat plying on any of the waters within the State, and every dining and buffet car within the State to have a city, town and county license for each and every city and county within which sales are attempted to be made.

"The defendant argued that such a conclusion would practically prevent the sale of liquor on dining cars and steamboats, but the Supreme

(Testimony of Cornelius G. Weber.)

Court said the Legislature had the right and power to do this, and refused to free the defendant."

A decision of that nature would create some discussion [246] in the State of Washington, wouldn't it, with respect to prohibition, don't you think, Mr. Weber?

A. It might.

Q. A decision of that nature would be published in the papers in the State of Washington, wouldn't it? A. It might.

Q. If it was, and a prospective buyer read it, he might have some doubts about going into the beer business, don't you think?

A. Not much, no.

Q. Not much?

Let us go back just a little bit further, to 1911.

I show you, Mr. Weber, the Anti-Saloon League Year Book of 1911.

Mr. Mackay: May I ask, Mr. Neblett, have you any books put out by the breweries?

Mr. Neblett: Yes, I have the Year Book of the United States Brewers, put out by the brewery business. I will be glad to call your attention to the contents in a little while. They ought to be authentic.

By Mr. Neblett:

Q. Mr. Weber, I show you an Anti-Saloon League Year Book for 1911, edited by Mr. Ernest H. Cherrington.

(Testimony of Cornelius G. Weber.)

Could I be pardoned just a second, your Honor? I want to have the 1912 volume marked for identification. [247]

The Court: That may be marked for identification as Exhibit B.

(The document referred to was marked as Respondent's Exhibit B for identification.)

By Mr. Neblett:

Q. Mr. Weber, calling your attention to an article appearing on the State of Washington in the Anti-Saloon League Year Book of 1911, I ask you to examine that article and see if you read this book when you were up in Seattle, and saw the map on page 78 of that book.

A. I don't recall seeing that map, and I did not read all of these books through. I didn't have that much time. I don't recall. I may have seen it, and I may not have. I did not attach as much importance to that as I did to this.

Q. I show you a map which bears beneath it the legend—what is that legend, Mr. Weber?

A. "White, dry area. Black, wet area."

Mr. Neblett: Your Honor please, I would like to have your Honor see the map. (Handing book to the Court).

The Court: It will be interesting for you to pursue this, but I recall that there are situations of this kind: there will be an area in which the sale of liquor is prohibited. For instance, I think the

(Testimony of Cornelius G. Weber.)

sale of liquor was prohibited around the University of California; probably still is. I don't think liquor could be sold within a radius of a [248] certain number of miles. It may take in practically the whole town of Berkeley. But, liquor is sold in San Francisco, so the sales, instead of being distributed over the two areas, are concentrated in one area. So, this is a very argumentative point that you are going into, assuming that there—let me see your map again.

Mr. Neblett: This is the map with respect to 1911.

The Court: Even in 1913, assuming that out of thirty-six counties in the State of Washington, (we can suppose that there were thirty-six counties), there were even only four wet counties. If those counties are distributed through the State, it is possible for those counties to be the selling points for an area that is quite wide, with dry areas around the side.

The fact is that the Seattle Brewing & Malting Company sold quite a large volume, by dollars, of beer in the State of Washington in 1913, isn't that true, Mr. Mackay?

Mr. Mackay: That is right.

The Court: So I do think, Mr. Neblett, that——

Mr. Neblett: I see your Honor's point.

The Court: ——you might shorten this. I know that you want to make an argument. You also want to call these matters to the attention of this witness, but from the witness' very complete direct

(Testimony of Cornelius G. Weber.)

testimony I understand that he [249] formed the opinion that Dr. Colvin's book was the most authentic study of prohibition and of the various periods in the history of this country when certain areas of the country adopted prohibition laws. That book is a general treatise. Dr. Colvin apparently referred to the Anti-Saloon League books and publications of various kinds, and no doubt in the appendix of Dr. Colvin's book he has a list of all his source material. At any rate, the relation of this to the entire issue gives it a value of not more than 50 per cent, anyway. It is not the whole point.

Mr. Neblett: Your Honor, my only point was to show that these books were in general circulation there. This book that Dr. Colvin got out was not published until 19——when, Mr. Weber?

The Witness: '26.

Mr. Neblett: The Anti-Saloon League Books were in circulation all over the country in 1913, and a man putting in his money would very likely go here to get his statistics with respect to what the trend was in respect to prohibition. That is all I am trying to do with this witness. I am going to show in a little while the newspaper clippings at the time prohibition commenced in the City of Seattle.

I see your Honor's point.

The Court: Now I see your point. This goes back [250] to the objection that you made when Dr. Colvin's book was mentioned by the witness. This book was written in 1926.

(Testimony of Cornelius G. Weber.)

Mr. Neblett: Exactly.

The Court: We are here considering what the willing buyer and the willing seller in 1913, having a knowledge of the trends and of market conditions and of the properties involved, would have paid for the good will of this business in the State of Washington.

Mr. Neblett: That is right.

The Court: And you, through these books, therefore wish to show the kind of information that people had circulating about them in 1913.

Mr. Neblett: That is exactly it, your Honor.

The Court: I don't think this witness is going to concede that people in Washington in 1913 were concerned about the increase of the dry areas in the State. So far the witness has indicated that he does not agree with your theory.

Wouldn't it save time if you have all of these books put in evidence? I don't know what the objection will be.

Mr. Mackay: Your Honor please, may I make this observation?

It is not my purpose in any trial to limit the Commissioner or the Respondent in examining one of my witnesses, [251] in testing his credibility or expertness, or anything else, but it does seem to me it is going a little far afield to read into all the books here to try and get all this evidence in by this witness.

The Court: That is correct.

Mr. Mackay: I think it is going a little beyond

(Testimony of Cornelius G. Weber.)

the method of procedure. I think, so far as counsel is concerned, if he wants to ask him about certain statements in the book, or a dozen books, to test his credibility or his knowledge, or something like that, it is all right, but to lay a foundation to read a lot of things in there for evidentiary purposes is wrong.

The Court: I think your objection and criticism are correct.

Mr. Neblett: Your Honor please, at the same time I am showing the circulation of this, I am showing that his opinion is not based on sound reasons, and I am trying to show that the information contained in these books is trustworthy. I can identify these books by him, which I am doing at the present time.

The Court: I wonder if you would consider asking the witness whether his opinion on the valuation question is affected by the fact that in 1913 this was the situation as shown by these reports?

Mr. Neblett: I did not quite follow you, your Honor. I have no objection to your Honor asking the witness a question if you care, or I can ask it.

I believe we have a pretty wide right, though, in cross examination. I have the right to test his credibility and to impeach his testimony in any way I can. Anything I can show that would influence a buyer, I think I have a right to show, to talk about what he testified in chief, matters connected with what he testified, and modify or explain his testimony in any fashion that we can on cross examination.

(Testimony of Cornelius G. Weber.)

The Court: You certainly have. Our difficulty is in understanding the purpose of your showing the witness these books, and of reading excerpts to the witness out of these books. It has not been entirely clear why you are doing that. It is an unusual kind of cross examination.

Will you proceed?

Mr. Neblett: Thank you very much, your Honor.

The Court: I expect we should not insist that Mr. Neblett abandon this inquiry that he is making. The whole thing is unusual, but I think we will just go ahead.

Mr. Neblett: Very well, your Honor. I certainly will keep in mind your admonition to shorten it as much as I can.

Mr. Cassel, may we have "Anti-Saloon Year Book, 1913," marked for identification? [253]

The Court: That is being marked Exhibit C, is it, for identification?

Mr. Neblett: Yes.

(The document referred to was marked as Respondent's Exhibit C for identification.)

By Mr. Neblett:

Q. Mr. Weber, I show you the Year Book of the United States Brewers Association for 1913. Did you ever look at the book of that Association?

A. Yes, I looked through some of those books, but did not get much out of them.

Q. Do you recall whether you looked through the 1913 Year Book?

(Testimony of Cornelius G. Weber.)

A. I scanned through the 1913.

Q. Calling your attention to page 58 of this book as to the State of Washington, I call your attention to the short statement, five or six lines:

> "Washington. The dry and wet issue in the State of Washington was one of the most important local questions to come up in recent elections. The victory is about even for the saloon and anti-saloon forces. Licensed saloons won out in several instances, notably Olympia, but the general tendency was to maintain present conditions. Kennewick, which has waged a bitter fight, voted to remain dry, and Vancouver, after a spirited contest, decided to stay wet." [254]

With that statement in mind, what effect, Mr. Weber, do you think that would have on a prospective buyer of a beer business in the State of Washington?

A. They had so much of that over a period of years, shifts this way, shifts that way, and as I repeatedly said, "Wolf! Wolf!" and I don't think it had any material effect, because that controversy has been going on and on and on.

Q. How do you explain that on November 3, 1914, the State of Washington voted dry, Mr. Weber?

A. Because the majority of the people that went to the polls on that date voted dry; those that went.

Q. Is that your explanation?

(Testimony of Cornelius G. Weber.)

A. Well, I think that is obvious. I would say that is very obvious.

Q. Let us cut a little deeper than that. What caused the people, in view of your testimony, to go up to the polls and vote dry on November 3rd?

A. A very, very intensive campaign by the Anti-saloon League. I read about that campaign. They put on a real campaign in Washington.

Q. And the campaign was all written up in the papers in Washington, was it not?

A. The campaign? I read about it in the Anti-Saloon League Book.

Q. I did not ask you that. You answer my question. I [255] asked you if this campaign appeared in the papers of Washington, the daily papers.

A. Not much, from what I saw.

Q. You didn't see much?

A. Not much.

Q. Do you know what the vote was on November 3, 1914?

A. Yes, I know what the vote was. I can give it to you.

Q. What was it?

A. Well, I can't remember all of these figures. Let me get it here.

Q. I will give it to you, if you are just looking it up now.

A. Well, one hundred eighty something and one hundred seventy-one something thousand; in that neighborhood. I don't know the exact figures.

(Testimony of Cornelius G. Weber.)

Q. Just wait a minute, now. I will put it in the record for you.

Mr. Mackay: Let the witness answer. He has the right to look it up.

A. The vote was 180,840 for prohibition, and 171,208 against.

Q. That is correct.

Now, Mr. Weber, what are some of the daily papers [256] in the State of Washington?

A. What are some of the daily papers?

Q. Yes.

A. Well, the Seattle Times and the Post Intelligencer were the main dailies at the time.

Q. What are some more papers?

A. Well, there was an Argus there. I think that was a weekly at the time, and those are the only three I know of.

Q. Did you ever hear of the Tacoma Ledger?

A. Well, I am talking more specifically about Seattle. Yes, I have heard of the Ledger.

Q. The investigation you made in this case, was it confined solely to Seattle, when you went to Washington?

A. No, it wasn't confined to Seattle, but it wasn't a case of going to every town in the State.

Q. Do you know how many times, or the number of references to local option and state prohibition in Washington in 1912 and '13 appeared in the Seattle P. I., Post Intelligencer?

A. I think I have a record of it, but I don't remember the figures, and it is buried in my notes

(Testimony of Cornelius G. Weber.)

somewhere. I have an extract of different articles that appeared.

Q. When you were up there in Seattle making investigations, did it occur to you to go back and look at the old files of the papers and see what was said?

A. I spent two solid days in just those files, yes, sir. [257]

Q. The old newspaper files? A. Yes, sir.

Q. In what company?

A. In the Public Library.

Q. In your testimony here, you did not say anything about that. Do you recall, then, now, since your recollection has been somewhat refreshed, how many times there appeared in the Seattle Post Intelligencer references to local option in 1912 and 1913?

A. I would say it was not very often in comparison to the number of papers, but I haven't got the figures in mind.

Q. Let us take the Seattle Times. What would you say about the references to prohibition in 1912 and '13 in the Seattle Times?

A. The same thing. Not very much.

Mr. Mackay: What are you talking about, news articles or editorials?

Mr. Neblett: I am talking about articles and references to local option and prohibition in the papers which a buyer would probably see.

Mr. Mackay: Thank you.

(Testimony of Cornelius G. Weber.)

By Mr. Neblett:

Q. You haven't any information on that, Mr. Weber?

A. I have some information, but not very much, and I can't give you the figures. I did not consider them important [258] enough.

Q. I have a sheet here attached to a protest furnished us by petitioner. It says, "John E. Forbes & Company, Rainier Brewing." It is entitled, "Rainnier Brewing Company Summary Showing the Number of References to Local Option and State Prohibition in Washington in 1912 and 1913 Compiled from Leading Newspapers by Month."

Look at that summary and see if it refreshes your recollection as to whether or not that is what you saw when you were investigating the newspaper files in Seattle.

A. I saw it, but I saw nothing very convincing in any of them. I just would not put any interpretation on them; in fact, disregarded them after I had them.

Q. You disregarded them completely?

A. Yes, because they meant nothing, just a controversy back and forth and back and forth. I couldn't make anything out of it until I got a hold of this.

Q. Unless you saw something that was very favorable to your side of the case, it is a fact that you disregarded it completely?

A. Indeed no. I come to these cases with a privilege to turn them down, and I am not going on a

(Testimony of Cornelius G. Weber.)

witness stand for a lot of fun and saying a lot of things that I don't mean. I wouldn't do it for anybody; neither here nor there.

Q. Let me test your expertness for a second, and the [259] basis of your approach, Mr. Weber.

Do you think if a man was coming into the State of Washington with some money to invest in beer, and he looked in the paper and saw all this argument about prohibition, and saw this data that I have shown you from Respondent's Exhibits for identification, A, B and C, would you say that would have any influence at all on whether or not he invested $1,000,000 in the good name up there, in the name of a beer company?

2—RAINIER—folo Watts—April 10 Sprague

A. Practically no influence, as I have shown and answered before, showing what money these people put into breweries at that time, they could not have been influenced by that to amount to anything.

Q. Suppose you had told this gentleman to go ahead and put his money up, and on November 3, 1914, he came around and told you that statewide prohibition had been passed, what would you tell him as to your judgment?

A. I would have to admit that the facts of voting prohibition were contrary to the outlook at the time. That is obvious.

Q. Would you come right out and tell him, "I apologize. I was wrong, dead wrong. I did not evaluate this trend as I should."

A. How would you value other things? Just the

(Testimony of Cornelius G. Weber.)

way they appear at the time. Those are the only indications you have [260] of value. In retrospective hind-sight, it is easy to see afterwards what conditions were. Just like Colvin's book is a perspective. He can see the significance of the event in retrospect.

Q. What is your definition of "fair market value?"

A. What a willing buyer would pay a willing seller at an arm's length transaction.

Q. When?

A. At the particular time of this particular case, March 1, 1913.

Q. Is that your entire definition?

A. Just about, yes.

Mr. Neblett: Read that definition back, will you please, Miss Reporter?

(The answer was read by the Reporter.)

By Mr. Neblett:

Q. You would say that was just about the total of your definition? A. Yes, that covers it.

Q. And your $1,000,000 value here for the trade name was based on that understanding of fair market value, is that right? A. Yes, sir.

Q. Your definition does not include knowledge of the facts by both parties, Mr. Weber. [261]

A. Well, that is understood. A man would not buy anything he did not understand anything about. That is just common sense.

Q. I am just saying, though, your definition of "fair market value" did not include that.

(Testimony of Cornelius G. Weber.)

A. Then I could give you a very, very long definition. I would have to sit down and write that out and take in all the factors if you cannot imply that people exercise common sense in buying something. They know about it.

Q. A buyer coming into the State of Washington and exercising common sense, don't you think he would get statistics on the entire business from any sources he would think were trustworthy?

A. Certainly he would; no doubt did.

(Witness excused.)

Mr. Neblett: Your Honor please, may we have this exhibit marked for identification as Respondent's Exhibit D, I believe?

The Court: That will be marked for identification as Exhibit D.

(The document referred to was marked Respondent's Exhibit D for identification.)

Mr. Neblett: Exhibit D is a summary showing the number of references to local option and state prohibition in Washington in 1912 and '13, compiled by leading newspapers, [262] by months.

The Court: I think that we will recess for the day. It is about 5:30.

I would like to have a conference with counsel on the time that we may expect should be allowed for the full presentation of the case without anyone's feeling that he has to hurry too much.

I would like to work out a plan so that everything

will be thoroughly considered and the witness will be allowed to talk as much as he wants to, and we won't feel too pressed.

So, we will recess until tomorrow morning. I think we should convene at 9:30.

Mr. Mackay: I think that would be very agreeable.

The Court: That will save us a half hour.

9:30 tomorrow.

(Whereupon, at 5:30 p. m. a recess was taken until 9:30 a. m., Friday, July 20, 1945.) [263]

Proceedings, July 20, 1945

The Clerk: Mr. Weber, will you please take the stand?

CORNELIUS G. WEBER,

called as a witness for and on behalf of the petitioner, having been previously sworn, was examined and testified further as follows:

Cross-Examination—(Resumed)

The Court: Go ahead, Mr. Neblett.

By Mr. Neblett:

Q. Mr. Weber, in order to orientate ourselves, I believe we were discussing yesterday your judgment in advising a prospective buyer to pay a million dollars for the name Rainier, is that right?

A. Yes.

(Testimony of Cornelius G. Weber.)

Q. As of March 1, 1913? A. Yes, sir.

Q. And your disregard of certain factors in the current literature of 1913, is that right?

A. I did not disregard any that I investigated. I did not disregard any.

Q. I believe you told us yesterday that these various matters and data I showed you from the current literature of the time, namely, March 1, 1913, you disregarded, it didn't [268] make any difference to you at all, is that right?

A. Do I have to answer that question "Yes" or "No," or can I qualify that?

The Court: Answer "Yes" or "No," and qualify it. You answer it the way you think you should answer.

The Witness: Subsequent review by Dr. Colvin and his crystallization of the past events I considered more authentic than the current partisan views.

By Mr. Neblett:

Q. I believe I called your attention to the Year Book of the United States Brewers Association for 1913. Did you consider the article or the excerpt I read you from that book a partisan view in so far as this case is concerned?

A. I don't recall the specific excerpt.

Q. I will refresh your recollection, Mr. Weber, and ask you to refresh your recollection by reading that excerpt on page 58 of this Year Book of the Brewers Association.

A. (Examining document): I believe I reviewed that. I believe I saw that.

(Testimony of Cornelius G. Weber.)

Q. Don't you think a prudent buyer would probably have called for the Year Book of the United States Brewers and looked at it before putting up his million dollars?

A. I don't doubt that they did. Anybody investing money must have. They had those books in circulation in breweries more than any other place.

Q. Now, if this prospective buyer that you advised to put his million dollars in the business had followed your advice and paid a million dollars for this right, can you give us any idea of how much money he would have lost on the transaction?

A. He would have lost very much money later on just the same as those that put their money into physical assets that became practically worthless. There were many buyers at that time—if you consider expanding a brewery, or building new breweries, that went dry later on; that money was also wasted.

Q. Yes. A. No different.

Q. In other words, he would have practically lost his million dollars, would he not?

A. Practically so. Not the million dollars, but he would have lost a good bit of money, that is true.

Q. Then if he had followed your advice and your evaluation of the trends, he would have lost a substantial amount of money, is that not right?

A. Yes, he would have.

Q. Now, Mr. Weber, in this same book, the Year Book of the United States Brewers Association, 1913, I call your attention to another article on

(Testimony of Cornelius G. Weber.)

page 248 entitled "Aiming at National Prohibition." [270]

When you were making your investigation of this case, did you read that article, if you recall?

A. (Examining document): I didn't read all of the literature.

Q. I didn't ask you that.

A. No, I didn't. I didn't read that article.

Q. O.K. You knew that the United Brewers put out a Year Book for the year 1913, did you not?

A. Yes, sir, and I reviewed many of them.

Q. But you did not happen to review this one, the one for 1913?

A. Oh, yes, I did, very much, 1913, but I didn't read every article in it.

Q. Did you check the indexes in this book for 1913 very carefully as to what was in it?

A. I did.

Q. And you overlooked, then, in your research this article "Aiming at National Prohibition," is that right? A. I didn't overlook it, no.

Q. You didn't consider it necessary to read it, in other words?

A. I scanned some of these articles, and if they were not sufficiently pertinent or conclusive, if they were merely controversial I disregarded them because I was looking for [271] concrete facts and not this endless controversy that has been going on for a hundred years.

Q. It seems to me you would find concrete facts in the Brewers' own book?

(Testimony of Cornelius G. Weber.)

A. Yes, I did. I have many notes and supplementary notes taken out of the Year Book. I can't recall what they all are. But I have made lots of extracts from the Year Books, pages of them.

Q. All right. Now I am going to call your attention to one factor here, just the first paragraph of this article, which consists of about four pages:

> "We have time and again pointed out to our members that the Anti-Saloon League was aiming at national prohibition under the makeshift of local option. Elated over the passage of the Webb Bill, it has at length frankly declared its purpose. That such program meets with full sympathy in the general body of temperance extremists is clearly evident from the following editorial expressions in the Michigan Christian Advocate. Under the caption 'Amend the Constitution Once More,' this paper states:——"

Now, incidentally, Mr. Weber, what was the Webb-Kenyon Act? I want to see how thoroughly you did prepare your research.

A. I couldn't specifically tell you the details of the [272] Webb-Kenyon Act, or every law that was passed at that time. I have gauged this thing by the practical facts of breweries being built and expanding, and the retrospective history which shows what had been going on after.

Q. I didn't ask you that. I asked you if you knew what the Webb-Kenyon Act was?

(Testimony of Cornelius G. Weber.)

A. I didn't go into specific——

Mr. Neblett: (Interposing) It doesn't seem to me, if your Honor please——

The Witness: (Interposing) I can't answer for these legal——

Mr. Neblett: (Interposing) This witness went clean over the ocean to Chamberlain and Mussolini in his testimony in chief. He was a very voluble witness, and he covered a very wide territory, and he has put his testimony in here, and we think on cross-examination we should be allowed great leeway.

The Court: Go ahead.

The Witness: As I recall, it was a local option Act, but the details——

By Mr. Neblett:

Q. (Interposing) Now, do you know when the Webb-Kenyon Act was passed, or anything about it at all?

A. I think it was in 1909, but I am not sure.

Q. Now, my advices show and my notes show that the Webb [273] law was passed—the judiciary reported in the Webb Bill on February 8, 1913.

A. 1913.

Q. And it was passed by a vote of 239 to 65. The following Monday the Senate passed the Kenyon Bill, amended to read exactly as the Webb Bill.

Now, did you find out anything about the Kenyon Bill in your research on this question?

A. In my research on this question, when I

(Testimony of Cornelius G. Weber.)

found that the local option, as Dr. Colvin found, had worked contrary to prohibition——

Q. (Interposing) Just a minute, Mr. Witness. I asked you: Did you find out anything about the Kenyon Bill? A. No, I did not.

Q. You did not?

A. No. I read about it, but I did not go into detail, and I didn't make any notes on it.

Q. You didn't learn, then, that the Webb-Kenyon Bill was an anti-shipment of liquor Bill? You didn't learn that, did you?

A. (No response.)

Q. You know what the original package law was, don't you, being in the brewery business as long as you have been?

A. The original package law? [274]

Q. Yes. A. Yes, sir.

Q. What was that law, then?

A. That you couldn't fake any packages, or re-use a package, as I recall. You have to use your own labels and you cannot use anybody else's name.

Q. Wasn't the original package law, Mr. Weber, that you could ship whiskey into a dry State in the original package, and under the interstate commerce law it almost put the station masters and express companies in business, in the whiskey business because a man in a dry State could go down to the station and get his original package? Wasn't that what that law was?

A. Oh, the whiskey end, I didn't go into the

(Testimony of Cornelius G. Weber.)

whiskey phase of this thing. I was more concerned with the beer phase. That didn't concern me. I——

Q. (Interposing) Beer and whiskey are somewhat related, are they not?

A. Very distantly, I would say.

Q. But they do both have alcohol in them?

A. Yes, yes, they would have alcohol in them, but there would be a difference.

Mr. Neblett: If your Honor please, may we have marked for identification——

The Court: (Interposing) That would be "E" for [275] identification.

Mr. Neblett: Yes, Respondent's Exhibit "E", page 58 of the Year Book of the United States Brewers Association.

The Court: That may be marked for identification as Exhibit "E".

(The document referred to was marked as Respondent's Exhibit "E" for identification.)

Mr. Neblett: We would also like marked for identification the article on page 248, "Aiming At National Prohibition."

The Court: "F" for identification.

(The document referred to was marked as Respondent's Exhibit "F" for identification.)

By Mr. Neblett:

Q. Mr. Weber, I show you a book entitled "Review of Reviews, Volume 48, July-December 1913", and call your attention to an article in this

(Testimony of Cornelius G. Weber.)

volume entitled "The Campaign Against the Saloon", by Ferdinand Cowle Iglehart.

This article consists of one, two, three pages, and is illustrated with maps.

Do you recall whether in your research you read that article before forming your opinion?

A. I did not read that article, and I did not place much reliance on maps. I think maps are the most deceiving thing in this whole campaign. No, I did not see that. [276]

Q. You don't think maps are something that you can see with your face as trustworthy, I mean with your eyes as trustworthy?

A. To a degree, yes; to a degree, yes.

Q. But testimony which is not so patent is more reliable, is that your theory as an expert?

A. Not at all. The pros and the cons, whichever outweighs the other, in my opinion, is the thing that I act on.

Mr. Neblett: If your Honor please, we ask that this article "The Campaign Against the Saloon", by Ferdinand Cowle Iglehart, contained in the July-December 1913 Review of Reviews, be marked for identification.

The Court: It will be marked for identification as Exhibit "G".

(The document referred to was marked as Respondent's Exhibit No. "G" for identification.)

Mr. Neblett: Incidentally, your Honor, it is a

(Testimony of Cornelius G. Weber.)

very nice summary of Mr. Weber's testimony, but putting an entirely different light on some of this. I would like to have both sides in the record.

Your Honor might enjoy seeing this article (handing document to the Court).

The Court: Are you going to introduce it in evidence later?

Mr. Neblett: Yes. [277]

By Mr. Neblett:

Q. Now, Mr. Weber, I believe you referred rather extensively in your testimony in chief to a book published in 1927, I believe? A. '26.

Q. '26? A. Yes, sir.

Q. And, therefore, I am going to refer to a book published in 1913. That is a little closer to the basic date.

Now, Mr. Weber, I call your attention to the Sunset Magazine—you have heard of that Magazine, have you not?

A. I have heard of it, yes.

Q. It is published out on the West Coast and has got a lot of pretty pictures in it.

Volume 33, 1941, and ask you if, in your research on this question, you had occasion to call for this volume and whether or not you read an article—— A. (Interposing) No, I did not.

Q. What, let me finish now before you commence to nod your head.

(Continuing) Whether you read an article "State-wide Prohibition in California", by S. W. O'Dell? A. I did not.

(Testimony of Cornelius G. Weber.)

Q. You did not read that article?

A. No, sir. [278]

Q. And you don't know what it contains?

A. I do not.

Mr. Neblett: If your Honor please, we ask that an article appearing in the Sunset Magazine, Volume 33, 1941, entitled "State-wide Prohibition in California", by S. W. O'Dell (incidentally, President of the California Dry Association) be marked for identification.

The Court: It may be marked for identification as Exhibit "H".

(The document referred to was marked as Respondent's Exhibit "H" for identification.)

By Mr. Neblett:

Q. Mr. Weber, turning to another point, let us attempt to analyze what you consider goodwill to be.

What do you include as the goodwill of a company?

A. The goodwill broadly, in a case of this kind, includes everything of an intangible character. Now, any business, any physical property, any patent assumes reasonably good management in order to be successful. Now, if you have a name, a trade name that is the basis, the controlling element in producing big sales and big profits, the profits that are over and above an amount necessary to satisfy the capital and physical property broadly could come under the term "goodwill".

(Testimony of Cornelius G. Weber.)

Now, with very poor management, goodwill could peter out, and with reasonably good management it could not, so that broadly is all-inclusive.

Q. I don't want the answer quite as broad as that, Mr. Weber. I want you to break the goodwill down for me and show me right now what is specifically included in it. Certainly, you know the items of goodwill are the things that go to make up goodwill.

A. All of the items that make——

Q. (Interposing) Yes, I want you to name them right now, the factors that you took into consideration, and break it down for me, one, two, three, what you consider goodwill to include.

A. I have said that the goodwill includes all of the factors that make for profit over and above a normal return on the investment in physical assets, and it implies, of course, that management, good management goes along with the good name.

Q. All right, now stop right there. Let's get a responsive answer.

What are those factors now that you are talking about?

A. I couldn't possibly name them all, because you would just have to analyze the goodwill of every person and every customer all down the line. You can include those things only broadly. These are practical factors. You can't [280] theorize that down to the last detail.

Q. Well, let me ask you this now, Mr. Weber?

(Testimony of Cornelius G. Weber.)

Does your goodwill include the name of the Seattle Brewing & Malting Company?

A. It includes the name Rainier as attached to the property and the business.

Q. I didn't ask you that question. I asked you if your goodwill that you used in this case included the name Seattle Brewing & Malting Company, which company owned the name "Rainier"?

A. I have got it attached to Rainier, to Rainier.

Q. I didn't ask you that question. I asked you: Did the goodwill you used in this case include the name Seattle Brewing & Malting Company?

A. Well, it must have, because it was so tied together at that time, in 1931, that it was all a unit, the whole thing was a unit?

Q. Exactly. A. Yes.

Q. It was a unit, I believe you said?

A. The whole thing went together.

Q. So your value of one million dollars includes in its comprehensiveness the name Seattle Brewing & Malting Company, which owned the name Rainier?

A. No, it doesn't include it, except in this way: at the [281] time, and before—that is on the assumption that it would be divorced. At that particular time it was Rainier, as it was the property of the Seattle Brewing & Malting Company. That is what it was.

Q. That is the best you can do with that question? A. (No response.)

Q. And again in arriving at your value of the

(Testimony of Cornelius G. Weber.)

one million dollar figure, your value of one million dollars you included the name Seattle Brewing & Malting Company?

A. I included the name Rainier, the name Rainier.

Q. So you want to change your previous testimony?

A. Well, if you divorce it—you could divorce the name Rainier, or if the brewery would go out of business you could sell the brewery name, but then you come to that point of severance there.

Q. All right.

A. It is the name Rainier.

Q. Now, in your opinion can the name Rainier be severed from the business?

A. Yes, it can.

Q. It can? A. Yes, it can.

Q. All right. Now, let's sever the name Rainier from the business then. And is your value of a million dollars then based on the name Rainier severed from the business of [282] Seattle Brewing & Malting Company?

A. The sale value, yes.

Q. And you base that on this name alone, is that right? A. Yes, on the name.

Q. Well, now, Mr. Weber, do you think that the right to do business under the Seattle Brewing & Malting Company in the State of Washington had any goodwill value?

The Witness: That the what?

The Court: Read the question.

(Testimony of Cornelius G. Weber.)

(The question referred to was read by the Reporter.)

By Mr. Neblett:

Q. As of March 1, 1913?

A. I haven't investigated that as a separate condition at that particular time, as to what there was to that or wasn't. But I would say that without "Rainier" it wouldn't have been anything of any material consequence.

Q Do you know how long Seattle Brewing & Malting Company have been in business?

A. Yes.

Q. How long?

A. They have been in business since—I think it was since 1893, and I think the brewery was founded in the 80's. I have it in my records somewhere. [283]

Q. Did they have a list of customers? Did the Seattle Brewing & Malting Company have a list of customers in 1913?

A. They had a list of customers, yes.

Q. Do you know how many there were?

A. No. But I wish I could modify or expand on that a little bit, in the definition of goodwill.

Q. All right, go ahead and expand it. I don't want to cut you off. I want to be perfectly fair with you, Mr. Weber.

A. Goodwill, as recognized in appraisal practice, to have a value you first have to earn a substantial return on the physical assets. Now, even

(Testimony of Cornelius G. Weber.)

a company losing money, if it has got only five customers, you might say in a sense there is goodwill there, it has got the goodwill of five people. But he isn't making any money, and one wouldn't recognize that in appraisal practice as an element of goodwill until it builds up to a point where it represents money over and above the physical assets. So I didn't go into those customers or anything like that to see what they would have bought without that name, and whether it would have meant more than a fair return on the physical assets.

Q. Well, is not your value of a million dollars in this case based on the fact that prior to 1913 Seattle Brewing & Malting Company was making money? A. Prior to 1913?

Q. Yes. Isn't that the very essence of your value? [284]

A. Well, the name Rainier, with the name Rainier and the Medals that they won, and so forth.

Q. All right. These Medals don't have much to do with this case. After all, that is more or less of a commercial nature, Mr. Weber.

A. No, I don't agree with that.

Q. That happened in 1900.

Now, Mr. Weber, didn't Seattle Brewing & Malting Company as of March 1, 1913, have a going concern value separate and apart from the name Rainier? A. I can't divorce it.

Q. You can't divorce it?

A. No. It wouldn't have made any money in

(Testimony of Cornelius G. Weber.)

proportion, and all of that would have to come up to the point of earning a fair return on the entire physical assets before such a separation could be made at all.

Q. Didn't Seattle Brewing & Malting Company as of March 1, 1913, have a good sales organization separate and apart from the name Rainier?

A. Why, yes, those things are all necessary in any business.

Q. All right. Now, tell me, then, as an expert in the brewery business how much value would you attribute to the right to use the name of Seattle Brewing & Malting Company as of March 1, 1913, in the State of Washington, together [285] with its sales organization, together with its customers, together with its going concern value?

A. It would depend how much money they made without the name Rainier. They might give nothing for those things if it didn't support the physical assets.

Q. I don't want a "depend" answer. You are familiar with the facts as of that date. I want you to fix me a value.

A. I can't fix you a value on that.

Q. You can't fix it.

You have heard the expression used in this hearing, namely: "captive saloons"? A. Yes.

Q. Now, being in the brewery business, will you explain to the Court what the term means, Mr. Weber?

A. Well, it might mean that they control

(Testimony of Cornelius G. Weber.)

licenses, and they might control—not "control", but might put in bar fixtures or things of that sort and have a saloon under obligations. In some instances that may have been the case.

Q. Now, you say "might have." Now, that is a rather indefinite answer. You are an expert on some things. You ought to know thoroughly.

Is it a fact that the brewers at March 1, 1913, and at the present time, for that matter, engaged in the practice called financing saloons? [286]

A. There were some, yes, sir.

Q. Now, I take it, Mr. Weber, you examined the books and records of the Seattle Brewing & Malting Company as of March 1, 1913?

A. Those that were available to me I examined.

Q. Very well. And I assume your able counsel made the books available to you, did he not?

A. He made available to me certain records that have gone in as exhibits.

Q. And the officers of the company, knowing you were searching for a true answer here, made the books available, did they not?

A. When you say "books"——

Q. (Interposing) I didn't ask you that. I asked you if the officers of the company assisted you in any way in making the books available? Can you answer that question?

A. May I ask you what you mean by "books"?

Q. Well, the books and records of the Seattle Brewing & Malting Company?

(Testimony of Cornelius G. Weber.)

A. The records I have are records prepared by accountants. I didn't go to the original books.

Q. Very well. Now, let's see how imaginative or resourceful you were, then, as an expert.

Did it occur to you to ask Mr. Mackay or his clients how many captive saloons Seattle Brewing & Malting Company were [287] financing as of March 1, 1913?

A. I don't believe—they might have had that available. I didn't ask for it.

Q. And it didn't occur to you to ask them that fact?

A. Yes, it occurred to me, but the details back at that time, one could get so buried and involved, within the practical limits of work of this kind, which could go on for years if you hounded the last detail, I didn't go into all of those details.

Q. In other words, the substance of what you have just said since your opinion of March 1, 1913, is so confused that we cannot pay much attention to it? Is that the effect of what you said?

A. No, it was not based on details. It was based on the broad outlines.

Q. Based on the broad outlines, then?

A. Yes, sir.

Q. In other words, your opinion was based on broad outlines rather than specific and detailed facts?

A. Detailed facts make the broad outlines; little drops of water make the ocean.

Q. And you didn't think enough, though, to find

(Testimony of Cornelius G. Weber.)

out what the chemical analysis or the facts were with respect to the little drops of the water? That is the way it look to me. Is that right? [288]

A. You couldn't tie them up with the total. You can't from those details, draw a broad conclusion.

Q. Now, Mr. Weber, I must not let you get me off the track.

How many captive saloons——

A. (Interposing) I don't know how many captive saloons.

Q. Let me finish my question now.

How many captive saloons was Seattle Brewing & Malting financing as of March 1, 1913?

A. I haven't got the number.

Q. You haven't got the foggiest idea, is that right?

A. No, I haven't got the number, a clear idea of how many they had, if they had any. I presume they had some.

Q. Well, you feel sure, though, as a brewery expert, they might have had some?

A. They might have, but I wouldn't say they had.

Q. Well, now, you had some relation to a brewery. In fact, you have got an interest in a brewery, isn't that right?

A. We never had one saloon in a brewery.

Q. I didn't ask you that question. But you do operate a brewery or have got some interest in it?

A. That is right.

(Testimony of Cornelius G. Weber.)

Q. What happened to your brewery during prohibition, [289] incidentally? A. Dead.

Q. Dead?

A. Absolutely dead, and paid taxes to keep——

Q. (Interposing) And when did you bury it? Now, let's find out. A. Bury it?

Q. Yes.

A. In January, 1920; January 16th, to be exact.

Q. National prohibition came into effect?

A. That is right.

Q. And if your brewery had been in Seattle, Washington, you would have buried it when?

A. I wouldn't have buried it. We really didn't bury it; we kept our corporation intact, and when we revived in '33—and I don't think I would have buried that either, because the issue was not settled then, and it is still going on, the controversy.

Q. Well, we won't bury the brewery, but the brewery would have been dead as of January 16, 1920?

A. It would have been asleep, I would say.

Q. Well, asleep. Then you want to retract your previous description of the effect of prohibition?

A. The practical facts are we did not bury our property, we kept it up. [290]

Q. Even though it was dead you just let it lay around? A. We kept it in repair.

Q. Do you know how much money you spent on your brewery during prohibition?

A. No, I don't recall. It was a family affair.

(Testimony of Cornelius G. Weber.)

There were records kept, but I know I sank in a lot of money to keep it from——

Q. (Interposing) Well, how much money?

A. Well, I don't recall.

Q. Oh, you have got some idea?

A. Well, personally I spent a couple of thousand dollars.

Q. A couple of thousand dollars? A. Yes.

Q. What is the brewery worth?

A. G. Weber Brewing Company.

Q. No, I say what is it worth, what is the value?

Mr. Mackay: He didn't understand the question.

A. What is the value of it?

By Mr. Neblett:

Q. Yes.

A. What do you mean? Market value? Cost?

Q. No, what is the book value of it?

A. I haven't the figures with me now.

Q. You don't know the value of your own brewery? How [291] do you expect to value another man's brewery?

A. Well, I think I have a fairly good idea what the value is, but if you are talking about the physical property, what it was appraised at, or what the business would sell for, well, I would say offhand that if anybody would offer $100,000 for it he probably wouldn't get it.

Q. You spent $2,000 on it?

A. During prohibition.

Q. Probably to keep the roof?

(Testimony of Cornelius G. Weber.)

A. That is right. I didn't spend any unnecessary money during that time.

Q. Is it not a fact, Mr. Weber, that 80 per cent of the breweries as of March 1, 1913, were financing what is known as captive saloons?

A. I wouldn't know the percentage at all. I wouldn't know whether it was 80 per cent or 10 per cent.

Q. You made no investigation in that respect at all?

Incidentally, would you say that the captive saloons constituted a part of the goodwill of Seattle Brewing & Malting Company?

A. I think that I would say that that figure that I have put on is over and above anything of that order that they may have had.

Q. So you didn't consider that?

A. What is that? [292]

Q. As a part of the goodwill of Seattle Brewing & Malting Company?

A. I didn't consider that as part of the element that I appraised, no.

Q. Do you know whether statewide prohibition which came into being December 31, 1915, continued on in the State of Washington until national prohibition became effective?

A. No. In 1916, I think, January 1, 1916, I think it went into effect in Washington.

Q. Now, my question is: Did it continue in effect in the State of Washington until national prohibition became effective?

(Testimony of Cornelius G. Weber.)

A. Did prohibition continue in effect, do you mean?

Q. Yes, on January 16, 1921?

A. Yes, yes, it did continue.

Mr. Neblett: National prohibition, I want the record, your Honor, to show became effective January 16, 1920.

I stand corrected, Mr. Weber.

By Mr. Neblett:

Q. Mr. Weber, in arriving at your value of $1,000,000 did you use a formula of six times earnings to get at the goodwill value?

A. I didn't use a single formula. I drew a conclusion after making certain tests which involved formulas, but no single formula. That was just one factor, as I mentioned the [293] other day. That was one test I made of several tests.

Q. So the formula, a 6 per cent formula, was not applied in the case, is that right?

A. It was applied, but not as the sole consideration.

Q. But is your value based on the application of six times earning formula?

A. Value is based on judgment after making certain tests with formula and other considerations.

Q. Can you give us some case in which you used that formula as of March 1, 1913?

A. I have never made a valuation on a single formula, and if I were to name the cases in which I have applied tests, formulae, and so forth, why, I would have to look into my records and go into all

(Testimony of Cornelius G. Weber.)

of those to know where I used just that particular thing. I couldn't recall right now.

Q. You couldn't answer that now.

In other words, you didn't feel like—even though this was a normal and unorthodox and unique formula, you didn't feel it was necessary to check it before you brought it out here in the courtroom, is that right?

A. Oh, I have checked that in other ways, indeed, yes.

Q. I asked you if you ever used it before. You say you never have.

A. Yes, I have used it, but not as a formula to determine—to find a value as based on a single formula. [294]

Q. All right. Now, give us a case in which you used that formula so I can check it, if I feel like it is necessary, as of March 1, 1913, in a situation similar to the situation we have in the instant case.

The Witness: May I have that question, please?

(The question referred to was read by the reporter.)

A. Well, I can't recall any exact parallel of March 1, 1913. I have no exact parallels of this. These things are changing all the time. Every case is on its own merits.

By Mr. Neblett:

Q. So you just reached out and grabbed this formula out of the air, is that about it?

A. Indeed, no.

(Testimony of Cornelius G. Weber.)

Q. Mr. Weber, I am going to test a little further your million dollar value as of March 1, 1913.

When you formed that value were you aware of the fact, Mr. Weber, that this right and certain other rights under a contract of 1935 had been sold to Seattle Brewing & Malting Company of Washington?

A. You mean like the brewery property, and so forth?

Q. Yes. A. Yes, sir.

Q. You had read that contract over, had you not?

A. I had the essence of it only. I did not have the [295] full and complete details.

Q. Did you call for the contract and read it, or anything like that?

A. I didn't have it available.

Q. You knew about the contract, didn't you?

A. Yes.

Q. And you knew that Seattle Brewing & Malting Company paid a million dollars to Rainier, didn't you? A. That I knew.

Q. You knew that, didn't you?

A. I knew that, yes, sir.

Q. I notice here, in arriving at the March 1, 1913 value, you come to the exact figure of a million dollars. Was that just a coincidence or an accident, or just what was that?

A. Figures of that kind are in round sums. There is no man who can estimate anything of this kind with mathematical precision. It is just im-

(Testimony of Cornelius G. Weber.)

possible. It is a judgment figure, and I knew that they paid a million dollars.

Q. Yes.

A. Now, I wouldn't have any value of $990,000 or $1,050,000, as some of these things indicate, but a million dollars would have been a reasonable figure at March 1, 1913, and I think I have considerable support for that in considerations here that have been brought out. [296]

Q. Just a minute. Being in the brewery business (it now is a lucrative business) you knew if you reached a value of a million dollars for this March 1, 1913 goodwill that it would have a tendency to wash out all tax on this million dollars, didn't you?

A. I don't know what it would have washed out, whether it would have washed out all or not; but presuming that it would wash it out——

Q. Yes.

A. (Continuing) ——it wouldn't change my idea if I thought that the supporting facts were a million dollars. And if I had thought that the supporting facts were less I would have made it less. If I thought the supporting facts would be materially more, then I would have raised it because——

Q. (Interposing) I was a little interested (and it does have some bearing on your bias and prejudice) in just how you got to the exact million dollars that the right sold for.

A. The exact million dollars?

Q. It didn't vary a penny?

(Testimony of Cornelius G. Weber.)

A. Why, no. You get different tests that show very odd figures. But you wouldn't say "Well, this figures out to be $385,641.41," and say "That is the value." You can't make appraisals down to such fine points. The thing to do is [297] say a million dollars, nine hundred and seventy-five, nine hundred and fifty, a million twenty-five, a million fifty, round figures like that. I don't think it would be sensible to try to get anything like that so precise. No man is that good. He can exercise his judgment when he gets through. And there are a good many things that would substantiate much more than a million dollars, many more factors in here if they were brought out.

Q. The point is, Mr. Weber, the fact that you found exactly a million dollars makes me suspect or draw the inference that your million dollar value may have been somewhat influenced or forced by the fact that you knew this million dollar property would be washed out?

A. I think I have indicated one reason for a figure of a million dollars in specific facts, and I do not think that that is the guiding principle here at all because I can take it or leave it. I am free to do in these valuations what I see fit. No one is dictating to me what figures I have got to put in. I am absolutely independent. And there is many a time I just turn a figure down. I think the value is there.

Q. You didn't turn this down, though?

A. No, sir.

(Testimony of Cornelius G. Weber.)

Q. You came up with a million dollar value?

A. Yes, sir. I didn't turn it down because this thing [298] looked to me like a unique thing that was worth a lot of money.

Q. Yes, sir. And is it not a fact that you brewery men sort of have a tendency to stick together, Mr. Weber?

A. I don't know of any sticking together. We have been hanging out on a limb by ourselves for 92 years. No sticking together, nothing.

Q. You haven't been here for 92 years.

A. When I say "92 years" I mean our family. And it is quite a record, 92 years.

Q. Now, let's just test your expertness for a minute, Mr. Weber. Come down to 1934.

I withdraw that question at this time, your Honor. I may come back to it later.

What actual sale of trade names do you know about, Mr. Weber?

A. Well, I know Dodge sold to Chrysler for $150,000.

Q. When was that?

A. Good will. That is quite a number of years ago, and I don't recall the exact date.

Q. $150,000?

A. $150,000,000 I mean to say, good will.

Q. Yes.

A. $150,000,000. And I don't suppose the Coca-Cola name could be bought for any money in sight. But I don't [299] recall any particular brewery

(Testimony of Cornelius G. Weber.)

trade names that were sold, and if they were it wouldn't necessarily be indicative of this.

Q. You don't know of any possibility of a law being passed so they couldn't make automobiles, do you?

A. A law? Well, I know there has been a decree, or a ruling that they couldn't make automobiles for commercial purposes during the war.

Q. I mean as of normal times, not as a war emergency?

A. Oh, no, no; no, indeed, no.

Q. But that was the situation with respect to the brewery business as of March 1, 1913, was it not? A. That they could pass such a law?

Q. Yes.

A. I don't know whether the constitutionality of the law would have—I don't think it would necessarily follow that you could conclude at that time that it would be constitutional. Probably a law could be passed, but whether it would be constitutional would remain to be tested by the Courts thereafter.

Q. That is somewhat unresponsive, but we will let it go.

Mr. Weber, where were you in 1912 and 1913?

A. In August, 1912, I left Janesville, Wisconsin, and went to Great Falls, Montana, and I stayed in Great Falls——

Q. (Interposing): I didn't ask you—Did you live [300] there, I mean?

A. I lived there, yes.

(Testimony of Cornelius G. Weber.)

Q. Now, how about '13, 1913?

A. In Stockett, Montana, which is 18 miles out of Great Falls, where I was superintendent of automotive power for the Cottonwood Coal Company.

Q. That had nothing to do with beer, I take it?

A. That had nothing to do with beer, no; strictly engineering.

Q. And when was the first time you ever went to Seattle, Washington?

A. I went to Seattle, Washington, last March.

Q. March 1, 1944? A. 1945.

Q. '45, yes. That is the first time you ever went into the Northwest?

A. Well, I have been here in the Northwest, but the States of Oregon and Washington were two of the six States I had not visited.

Q. And all the information you got as of March 1, 1913, then, came by your research rather than by personal knowledge that you might have had as of March 1, 1913?

A. I didn't live there on March 1, 1913, I don't think, but a few of us probably did, some of the gentlemen that were connected—— [301]

Q. (Interposing): Now, Mr. Weber, your value was based on earning figures for the fiscal year June 30, 1912, I believe, is that right?

A. As an indication of the status the company had reached.

Q. Yes.

A. Not just that figure, but that figure as an indication of what the general situation was.

(Testimony of Cornelius G. Weber.)

Q. Yes.

A. I marked up the assets somewhat, and I reduced the profit somewhat as a fair and reasonable indicator of the existing status.

Q. And is it not a fact that earnings for the fiscal year June, 1913, would show a trend——

A. (Interposing): They showed a little less profit in the following year, and a little less——

Q. (Interposing): A little less favorable trend?

A. Yes, but those figures weren't available for March 1, 1913.

Q. You didn't ignore that trend?

A. I didn't ignore it, no. I looked at that.

Q. And "trend" means a down movement, doesn't it, I mean if it is that way? If your earnings were less that would be a downward trend, would it not?

A. If you talk about a "trend"—— [302]

Q. I didn't ask you that. I asked you if a downward trend would be reflected by earnings, if the earnings were less?

A. I can answer that only by saying "Yes" or "No."

Q. All right.

A. Basic trend and momentary trend.

Q. All right. A. It is not——

Q. (Interposing): It is "Yes" or "No," whichever suits the case, I take it?

Mr. Mackay: If your Honor please,——

Mr. Neblett (Interposing): If your Honor please, I think the question was proper.

(Testimony of Cornelius G. Weber.)

Mr. Mackay: I think that a year's earnings doesn't indicate a trend.

Mr. Neblett: We think they do.

Mr. Mackay: Go to '14.

The Witness: What about '14?

By Mr. Neblett:

Q. We will stick to '15 for a while. But if the earnings were less in 1913 than they were in 1912, that would show a downward trend, is that not right? A. Momentarily, yes.

Q. Now, Mr. Weber, were not conditions in 1913 entirely different from what they were in 1935?

A. Basically, those factors that continue in this situation, I would say "No," except for the fact we had no income taxes at that time, profits were not taxed, and a dollar, of course, bought a whole lot more than it did now, but, after all, an investment, a yield from an investment—well, you really had more left in 1913 than you had in 1940. I would say there was that big basic difference.

Q. There was no threat of prohibition in 1935, was there, Mr. Weber, in the brewery industry?

A. Yes, the threat is even now, there is always that threat, and that threat has been going on for a hundred years.

Q. All right, let me see how good a prognostic you are. You prognosticated in 1913 we wouldn't have prohibition in the State of Washington, and we had it in 1913. Now, let's give you another chance.

(Testimony of Cornelius G. Weber.)

When do you think we will have prohibition again?

A. I have no crystal ball. I couldn't say when or whether. I wouldn't know.

Q. Let's have a prognostication on it.

A. I wouldn't attempt such a prognostication. I just continue to believe,—well, there is things going on. There is nothing written in the cards now, that I would have any particular fear. But, my good lands, when we were selling scrap iron to Japan we didn't prognosticate we would have war. [304] I couldn't prognosticate that.

Q. Do you think we will have prohibition in ten years?

A. I don't think that at all, no, I don't.

Q. Well, let's slip up another ten; twenty years?

A. I have no opinion as to whether we will or won't, except that the current situation is such that I wouldn't have any fears, but to try to predict that there would or wouldn't be, I wouldn't say that.

Q. Now, I will try to point up to you, Mr. Weber, the 1913 date and the 1940 date. Now, will you say whether or not the situation in '13 was any different from what it was in 1935 and 1940?

A. Well, there might have been a little more fear at the time.

Q. What time?

A. Well, about 1908, and then in 1909 to 1914, when there was an ebb, and we had had three big waves before, and this thing being on the down grade, I really wouldn't say that as you could see

(Testimony of Cornelius G. Weber.)

it at that time, that there was any very big difference. I wouldn't say so. That difference became pronounced in '15 and '16. That was different.

Q. Let me put it this way: Do you think there was more threat, after looking at these maps I have shown you, in 1913 of prohibition than there was in 1935?

A. Maps take in more ranges and things of that kind, [305] and just the big patches there. Without reading into the literature of that I couldn't judge what those maps meant.

Q. Well, forget the maps. Do you think, then, that prohibition was more imminent as of March 1, 1913, than it is now?

A. Retrospectively that may be true.

Q. I didn't ask you "retrospectively."

A. But at the moment, no.

Q. That was your judgment as of 1913?

A. That is why my father spent a lot of money to fix up our plant. Yes, that happened to be the judgment. We found out later on there were potentialities we couldn't see at the time.

Q. How much money did your father spend?

A. I don't recall. We built a new brew house; we built a new bottle house.

Q. How much did you spend rebuilding that house? Have you got some idea of how much you spent?

A. Well, a small brewery, I imagine, at that time——

Q. (Interposing): You imagine?

(Testimony of Cornelius G. Weber.)

A. Those prices were less. Well, I haven't got the figures with me, and prices were different, and so forth, and that is a long, long time ago.

Q. Well, can't you estimate it for us?

A. Well, maybe, twenty, twenty-five thousand dollars [306] for a small plant in Wisconsin at that time.

Q. It might have been five thousand, is that right?

A. Oh, no, it was more than $5,000.

Q. You have heard of a Mr. Emil Sick in Seattle, have you? A. Yes, I have.

Q. Quite a well known man in the brewery business, isn't he? A. Well, I think so.

Q. You say you think so. Don't you know so?

A. No; I don't know him personally.

Q. Haven't you ever met him?

A. No, I have not.

Q. Do you mean you went up to Seattle investigating the brewery business and didn't call on Emil Sick? A. I mean to say that.

Q. It amazes me.

What is Mr. Sick's position in the Seattle Brewing & Malting Company?

A. I think he is President, if I am not mistaken, or is the head man; Chairman of the Board, or President; one of the two.

Q. Well, isn't the Seattle Brewing & Malting Company at the present time one of the bigger brewing companies in that neighborhood? [307]

A. Yes, it is a fair-sized outfit, yes, sir.

(Testimony of Cornelius G. Weber.)

Q. Well, didn't your knowledge of the brewery business tell you that Mr. Sick had been in the brewery business all of his life and was practically one of the best informed men in it?

A. Well, that is all hearsay evidence, what people tell me existed at that time, when it isn't of record, is a matter of history, recorded history, like Dr. Colvin's books, like recorded construction news, and things of that kind. And if Mr. Sick would tell me something, and I would tell the Court, "This is what Mr. Sick said," then Mr. Sick ought to testify. I can't rely so much on just asking people questions and then come in Court and say, "This is what I was told by so and so." I don't consider that——

Q. (Interposing): Let me test your method there just a little bit. After all, your method counts for a lot.

What distinction do you make from reading it out of a book where you have no chance to cross-examine the author and being in a position to talk personally to Mr. Sick where you have a chance to ask him these questions? Why would you make a distinction in favor of the book?

A. I would consider that a man of the apparent character of Dr. Colvin going on record before the public would sit down and try to be dispassionate and as fair as possible in recording the events of the past, when he can [308] review and sift out in light of the facts much better known afterwards, after the event, we know, that prohibition went into

(Testimony of Cornelius G. Weber.)

effect in spite of indications to the contrary. And when a book like that is accepted by a publisher, and so forth, and put out——

Q. (Interposing): Mr. Weber, you have told us that half a dozen times.

A. (Continuing): That it carries more weight with me than to just quickly ask somebody a few questions. He has not even got time to think and has not got the facts clear in mind, well, he says something and you put it down. I don't accept those things so readily.

Q. Don't you feel sure Mr. Sick would have given you a hearing if you had asked for one?

A. I doubt it very much. I don't know.

Q. You mean one brewery man wouldn't give another brewery man a hearing?

A. Maybe not. He might, and he might not.

Q. Anyhow, you didn't ask for a hearing?

A. No, I didn't.

Q. Do you know whether Mr. Sick spent any money advertising the name Rainier after he acquired it under the contract of 1935?

Mr. Mackay: If your Honor please,——

A. (Interposing): I assume he would have to keep the [309] name alive.

The Court: Just a minute, please.

Mr. Mackay: I haven't objected, and I don't want to at all interfere with an effort to test a man's credibility, but it does seem to me that when we get down to years subsequent to 1935, the man did not investigate—he was asked now whether he ad-

(Testimony of Cornelius G. Weber.)

vertised. Advertising expenses entirely beyond this scope, not proper cross-examination.

The Court: What do you mean? It isn't proper to ask whether he investigated?

Mr. Mackay: No, I mean the advertisements paid in '35 to '40. It seems to me that that is immaterial. I have no particular objection to it. It seems to me he is far afield in asking that. The man has already testified he never saw Mr. Sick.

The Court: The objection is overruled, if it is an objection.

Can we take a recess now?

Mr. Neblett: Very well, your Honor.

(Short recess.)

Mr. Neblett: Your Honor, just a few questions and we will be through with our cross-examination of this witness.

By Mr. Neblett:

Q. Mr. Weber, I understood your value of $1,000,000 [310] was based on having the Seattle Brewing & Malting Company continue to manufacture beer for the potential buyer; is that right?

The Witness: Would you read that?

(The question referred to was read by the Reporter.)

A. Not entirely; sale value, sale value of that name, and it would be the same for the owner as for the buyer.

(Testimony of Cornelius G. Weber.)

By Mr. Neblett:

Q. I don't think you understood my question, Mr. Weber. A. Maybe not.

Q. I believe your testimony shows that net assets, tangible assets were approximately $2,900,000; is that about right?

A. That is the grand total net assets of the company.

Q. All right. A. That is right.

Q. Now, to make it perfectly clear, what would the Seattle Brewing & Malting Company have done with assets of approximately $3,000,000 when they sold the name "Rainier?

A. It could have been very easily accomplished in this way: Sold the cream of the business, and they would have retained the business in outlying States. They could have done several things. They could have made—reorganized the [311] company, in which each side might have taken shares of stock, or the owner, the purchaser of the name Rainier might have made an arrangement whereby they would brew the beer for them under their own supervision and pay so much per barrel, so that they could have been in two entirely different companies, one operating in Washington and one without, and the brewery could have just been kept intact that way. That would have been one way to do it.

Q. Now, Mr. Weber, is it not absurd to say (in fact, ridiculous) that Seattle Brewing & Malting

(Testimony of Cornelius G. Weber.)

Company would sell the name Rainier and then continue to make beer for the potential buyer?

A. I would say that I doubt very much if they would have severed that business for a million dollars. I think that it is quite possible that they would have demanded a whole lot more before they would have actually separated with it that way. I think that is quite right.

Q. Yes. Is it not a fact that the Seattle Brewing & Malting Company, sitting there with a three-million-dollar business, could have caused the purchaser of the name Rainier to be in a position that he couldn't make any money at all?

A. The company could have caused that?

Q. Yes, caused that situation?

A. Well, if they would have wilfully put in barriers that would kill a deal, why, yes, in that sense they could [312] have done so. But presuming that willing buyers and willing sellers, and some practical arrangements of taking over the name, why, I think this would have been a very practical arrangement. In fact, I——

Q. Well, you don't think Seattle Brewing & Malting Company would have abandoned a three-million-dollar brewery business just because they told the name Rainier, do you?

A. They wouldn't have to abandon it.

Q. Suppose the Seattle Brewing & Malting Company were to have continued to operate its brewery, and they put beer out to their captive saloons, what

(Testimony of Cornelius G. Weber.)

position would that put the potential buyer in of the name Rainier?

The Witness: I don't think I understand your question.

Mr. Neblett: Read that, please.

I will reframe the question and make it a little simpler.

By Mr. Neblett:

Q. Seattle Brewing & Malting Company sold the name Rainier to a potential buyer?

A. Yes, sir.

Q. The brewery retained its three million dollars worth of assets A. Yes, sir.

Q. It financed a lot of captive saloons. [313]

Could not the Seattle Brewing & Malting Company put out beer under another name to its captive saloons, and the potential buyer that you talk about would have been very much handicapped in trying to sell beer in the State of Washington?

A. With very great difficulty, if they would have done that. That would have been a most difficult thing to do, to introduce a new name that the public doesn't know, because you can't force your sales too much through a saloon keeper. There has got to be a demand from people that know a thing by a name, like Schlitz, or Anheuser-Busch, or whatever the big names are. And if something else were just as good or better, they wouldn't know about it, and they wouldn't ask for it.

Q. Is it not a fact that this potential buyer that

(Testimony of Cornelius G. Weber.)

you talked about would have to spend considerable money building a brewery, or making arrangements of some kind to have beer manufactured by some other concern? Is that not right?

A. He would have to make some arrangements with the Seattle Brewing & Malting Company, if he wanted to buy it for a million dollars, if he would want it, and at the same time not go in for any other arrangement. He would have to pay more, and pay more on the order of what they did pay in 1940, where, for a saving of less than a hundred thousand dollars a year at that particular time he paid a million [314] dollars and capitalized it at less than 10 per cent. And I think that if he would just definitely want to produce it in a new brewery that he would have had to pay more than a million dollars, because I don't think that they would have considered sacrificing physical property for the sake of accepting the million dollars.

Q. You don't think the Seattle Brewing & Malting Company would abandon a brewery plant worth approximately three million dollars in order to sell the name Rainier, do you?

A. No, I don't think they would abandon it, I don't think they would. That is why I think they made some arrangement like I have indicated here.

Q. You think probably the Seattle Brewing & Malting Company would continue in the beer business, don't you?

A. For a big enough price you would sell that and continue in the beer business in a smaller way,

(Testimony of Cornelius G. Weber.)

I would think that, because every commercial thing of this sort has a price; some price will reach it.

Q. Now, just to test your thinking a little further, Mr. Weber: What, in your opinion, would this name Rainier have sold for in the State of Washington after State-wide prohibition came into effect in that territory?

A. I have no opinion as to the value except that I think it would have been materially less in the State of Washington after prohibition. I think that is very obvious. [315]

Q. Well, how much less, now? Let's get some opinion.

A. I don't know. I don't know. It would have had some price in the hopes that this was not permanent, but I have made no investigation as to what I would have thought at that time if it had been offered for sale.

Q. All right. A. I don't know.

Q. You don't have an opinion on that at all? You didn't make any investigation of it?

A. No, I have not; no, I have not.

Q. It didn't occur to you that that question might be asked of you at this hearing?

A. Sir?

Q. It didn't occur to you that that question might be asked of you at this hearing?

A. No, because it is so obvious that after unforeseen events developed that the name at the time when it was dormant would have been impaired materially.

(Testimony of Cornelius G. Weber.)

Q. Well, would you say it would be impaired to the extent of $800,000?

A. Well, it might have. I am not—I haven't any decisive opinion. I wouldn't be surprised at all.

Q. Well, now, after national prohibition came along January 16, 1920, would you say the good-will value of the name Seattle Brewing & Malting Company would have been [316] impaired still a little further?

A. Not only a little further. It would have been decidedly impaired. That is obvious.

Q. Exactly.

A. I don't think that there is any question about the subsequent events proving that.

Q. And then if you had been called upon—if some fellow had come out here in '22, we will say, after national prohibition became effective and had some good money and asked you, we will say as an expert, to advise him what he could pay for that name, what would you have advised?

A. In what year?

Q. In 1922, after national prohibition became effective?

A. I don't know what I would have advised him. If there had been any clear indication in 1922 that there would be a reversal of sentiment, I might have had an opinion, have a certain opinion, and if the sentiment would be such that prohibition was going to be permanent and irrevocable, in other

(Testimony of Cornelius G. Weber.)

words, if that would have been an absolute surety, that would have been very low.

Q. I am assuming that you are familiar with the sentiment now.

A. No, I am not. I did not make a study of the sentiment in '22.

Q. Didn't pay any attention to that at all? [317]

A. No. I had my work to do. I was not sitting there making studies on prohibition in 1922. We deplored the fact that we lost a very substantial amount of money, and then in the agricultural depression our farms did not produce anything, and we were worried about that, but we did not sit down and study the question.

Q. I am not asking you for your opinion formed in 1922. I am asking you for your opinion of what that value would be, formed, we will say, since you have been working on this case?

A. I didn't value this for every year from 1913 forward. I didn't value that in '22. I don't know.

Q. All right, let me ask you the specific question:

In your opinion, what was the goodwill value of this trade name Rainier after national prohibition became effective, immediately after national prohibition became effective January 16, 1920?

A. I don't know. They might have made some near beer under that name. There might have been some modifications of the Volstead Act. There might have been different things in the cards that I just

(Testimony of Cornelius G. Weber.)

don't know what they were. I can't put a value on it. It would take quite a little study.

Q. It would be materially less, though?

A. I am quite sure that it would be materially less.

Q. It might have been worth—— [318]

A. (Interposing) It might have been anything.

Q. It might have been $900,000 less?

A. It might have been, it might have been.

Q. It might not have been worth anything?

A. No, I wouldn't think that, unless the thing was absolutely certain, that there would never be a return.

Mr. Neblett: That is all.

Mr. Mackay: There is no redirect.

Call Mr.——

The Court: (Interposing) Just a minute.

Mr. Mackay: I am sorry, your Honor.

The Court: Mr. Weber, I would like to ask you one or two questions about the factors that you took into consideration in determining your value of goodwill because I do not think, from your testimony, that you took into consideration any other factors excepting the following: It is my understanding that the only factors you took into consideration were the earnings of the business for a certain number of years prior to March 1, 1913; the ratio of sales of beer in Washington to total earnings of the business.

I think those are the only two factors which figured very much in your computation.

(Testimony of Cornelius G. Weber.)

As I understand it, your opinion of value was based on a mathematical computation almost entirely; isn't that correct? [319]

The Witness: No; I have gone beyond that. I indicated a test.

The Court: Well, then, will you please state what factors you took into consideration, and by that I mean factors in the sense of elements, that is, elements that you can describe in simple terms, using the term earnings or something comparable.

Now, what factors—using the word "factors" in that sense—did you take into consideration in arriving at your opinion of the fair market value of the goodwill involved in the name Rainier, or whatever else you considered was involved in the goodwill of the business in the State of Washington?

The Witness: One factor here is sales of 172,000 barrels approximately.

The Court: Now, I asked you to please try answering my questions by using simple terms that would describe your factors.

Now, you have started in, you took into consideration sales. All right, that is a factor.

What sales?

The Witness: And royalty, a reasonable royalty.

The Court: What sales?

The Witness. Oh, the sales of beer in Washington on a barrel basis. [320]

The Court: What royalty?

The Witness: On the basis of a 75-cent royalty, which is all the way from 75 cents to a dollar higher

(Testimony of Cornelius G. Weber.)

than a normal profit on beer, and applying that to 172,000 barrels, that would be $129,000 of royalty indicated thereby.

The Court: What was that last figure?

The Witness: $129,000 a year would be indicated by such royalty.

The Court: Yes.

The Witness: Now, if you capitalize an income of that kind at around 12-1/2 per cent, which would be an earnings multiplier, a multiplier of 8, the equivalent, you get $1,032,000, so the equivalent release from royalty would indicate something on the order of a million dollars. Another thing I took into consideration was stocks in breweries and other enterprises at that time, March 1, 1913, and——

The Court: (Interposing) You mean common stocks or preferred stocks?

The Witness: Common and preferred. And in that connection I have made a rather exhaustive analysis of comparisons (I am sorry to say it is a chart that would require full explanation) to show why the value of the assets in toto on this brewery at March 1, 1913, would be about 160 per cent of the book value (I am speaking of the assets assignable to Washington), and if those assets were taken at [321] $1,750,000, and you apply 160 per cent to that, you get $2,800,000, and deducting therefrom $1,750,000, you also have $1,050,000.

The Court: Now, let me go over that with you again.

As you said yesterday, you assigned some of the

(Testimony of Cornelius G. Weber.)

assets of the total business to the business in Washington, you figured that the value of those assets was about 160 per cent of the book value.

The Witness: That is right.

The Court: And so figured, that the value of the assets assigned to the Washington business was $1,750,000.

Then you capitalized that, is that right?

The Witness: I take the $1,750,000, and on the basis of that comparison to these other stocks, it would have sold at 160 per cent of the book value, and 160 per cent of $1,750,000 is $2,800,000, which is $1,050,000 in excess of $1,750,000. So that is indicative of a million dollar value.

Then I considered it from this standpoint:——

The Court: (Interposing) I think you had better explain why you were comparing the—it is an involved process there. You took into consideration the market quotations for securities being sold on the market, securities of other brewery companies? [322]

The Witness: Yes, there were only two breweries with earnings and dividends at that time, and a winery. Unfortunately, they had no such earnings as Seattle Brewing & Malting Company. I, therefore, took some 1913 comparisons with other kinds of companies like American Tobacco Company, and so forth, and after seeing where these lined up in a type of chart that shows consistent relationships, stock prices, earnings and book value, I investigated the general situation in 1940 and 1913. In

(Testimony of Cornelius G. Weber.)

both of those years we had just emerged from a somewhat sub-normal business into business slightly above normal.

Then in the absence of breweries at that time that were making big money, and were published and had stocks on the market, I tested to see about how the 1940 conditions would match with 1913, and I found that the mean of the market prices of stock in 1940 we charted on this type of a chart matches up and falls right in line with the breweries for which I had statistics of 1913, which, to me, indicated that in 1940 and in 1913 you would have paid about substantially the same prices relatively, that is, for the two years. And, therefore, taking my 1940 breweries with 1913 statistics of breweries, a winery and other companies, I get a sequence that is entirely consistent with many charts of this kind that I have prepared and have submitted in tax cases before; in one I testified. And knowing that I have 20 per cent [323] on the net worth, that if the value of these assets on the market were known they would chart on the chart where the arrow is, and that indicates 160 per cent of the net assets.

Now, that was another way of arriving at it, but there is still other things that I considered.

I believe that in 1940, that, after all, we had income producing investments, then we had income producing investments in 1913, but in 1940 the income was taxed. In 1913, March 1st, it was not.

Now, the purchase in 1940 at a million dollars on the basis of royalties that had not yet reached $100

(Testimony of Cornelius G. Weber.)

meant a saving of from 98 to 100 thousand dollars a year under the then current conditions. Capitalizing the taxable saving, it is less than 10 per cent, and if this brewery—I don't know how much tax it paid, but assuming that it was as much as 20 per cent, the price they paid would represent a capitalization rate of practically as low as 8 per cent. Where I have worked with much bigger capitalization rates, I have found that stock market-wise the prices indicated payments on intangibles up as high, but those that I have analyzed, where the ratio was over 240 per cent of intangibles to tangibles.

I have found that what the Sick's Brewery, now the new Seattle Brewing & Malting Company, paid for this goodwill added approximately 82 per cent of the book value of the [324] tangible assets, where in this particular case it amounts to only 60 per cent on the tangible assets assignable to Washington for a larger volume of beer, for an income that was not taxable. And in considering what high figure 8 per cent and 10 per cent of this release from royalties in '40 would mean in dollars, away above a million, I concluded that this round sum amount was about as reasonable and close an estimate as one can make in matters of this kind. No single formula, no mathematicial precision. It just can't be done that way. So, after all, it is a matter of judgment which has been tested by the formulae and methods, but none of which I would take and start out the formula and say "I made this computation and here is the figure."

(Testimony of Cornelius G. Weber.)

I have figures that go up very high by some tests. But that is the way in which this was arrived at, making all of these different tests against it and then drawing a broad conclusion, not based on the single mathematics of any one thing.

The Court: I am not clear as to what you were asked to form an opinion of value on.

The Witness: The value of goodwill as associated with the trade name Rainier as of March 1, 1913.

The Court: In a transaction of what kind?

The Witness: Between a willing buyer and a willing seller, and each acquainted with the facts in the case, the [325] important available facts, presumably, you might say, all the facts, but I don't think there ever is anything in which all the facts are known. When people buy stock they don't know all the facts, but they know the basic underlying facts to a sufficient extent to act and make their commitments in money.

The Court: Of course, as an expert you are a practical man, aren't you?

The Witness: Practical and theoretical; both! I think that theory, if it is correct, and complete, meets with practice, and if it is incorrect, and incomplete, it does not. But I am a practical man. I consider myself such, yes.

The Court: What did that problem mean to you, the determination of the value of goodwill? What would a willing buyer be buying if he were buying goodwill?

(Testimony of Cornelius G. Weber.)

The Witness: The basic thing on which he could make earnings.

Now, understand, if he had the name alone and would try to sell beer but had no brewery or any means of getting beer, then obviously the only other thing he could do with it would be to lease it to somebody else on a royalty basis, somebody who had a brewery. But, presumably, it would mean that he would buy the use of the name in the State of Washington, and if he would want to run his own business, this would [326] carry with it the idea that he would either have to have a brewery, or would make some arrangements with the Seattle Brewing & Malting Company, or with some other company, that would permit him manufacturing.

The name is like the soul, and the plant is like the body, and the two go together under those conditions.

The Court: Well, that being true, that being your understanding of the problem, let me ask you this: Which one of these elements did you consider the most important in arriving at your opinion of values? The capitalization of royalties at 75 cents a barrel, or the second factor that you described, where you were looking into earnings and book values behind stock being sold on the Exchange in—I don't know in what year—maybe, 1940—at any rate, when you did undertake to find out whether market values of securities represented about 160 per cent of book values of tangible assets.

Now, I don't know how you really were applying

(Testimony of Cornelius G. Weber.)

that later kind of analysis to the problem of determining the value of the basic thing on which somebody could make money if he were buying the trade name Rainier. However, what I do want you to clear up for me, because I don't quite understand that, is which one of these factors did you rely upon the most, to which factor did you give the most weight?

The Witness: I think I gave practically—I would [327] say I gave practically equal weight to three things.

The Court: To the three elements, factors you have just described?

The Witness: That is equivalent release from royalty, the ratio of the value of the goodwill to the physical assets, because that seemed to be so well covered by what was paid for stock, and the fact that 60 per cent was relatively low compared to a goodly number of others. And I also considered when you are capitalizing anything at these high rates that I used, and they still meet the test, that I was on pretty solid ground, I do believe.

The Court: Well, turning now to your first factor of royalties, your idea was that a willing buyer of the goodwill of this business in the State of Washington (which you construe really to be a willing buyer of the trade name Rainier) would enter into a transaction to buy that goodwill only if he had his own brewery and was going to manufacture his own beer and sell it under that trade name, or, if he intended to sell to someone who did own a brewery,

(Testimony of Cornelius G. Weber.)

the right to use the name Rainier on a royalty basis; isn't that correct? Those are the two circumstances under which any willing buyer would buy the goodwill of the business in 1913 as the problem was presented to him?

The Witness: Not necessarily the only circumstances under which he would buy it, but the only practical circumstances, [328] I would say, in which the owner could have afforded to sell it.

The Court: I am looking at this from the standpoint of the buyer at the present time. That is the question that I have asked you.

Could you think of any other situation, imagine a buyer in any other situation other than the two I have suggested to you?

The Witness: He would have to have those arrangements of some kind in mind to exploit.

The Court: Those two situations?

The Witness: Yes.

The Court: I want to ask you another question. Now, I want to just settle on one thing now. So if you can think of another situation that you want to be considered in your next answer to the next question just suggest that one to me.

The Witness: Well, I think that would have been substantially the situation.

The Court: All right. Now, why did you think that "X," the willing buyer in this problem, could have turned around and sold to "Y" the right to use the trade name Rainier on a royalty basis of 75 cents a barrel on March 1, 1913?

(Testimony of Cornelius G. Weber.)

The Witness: Because they were making over $2 a [329] barrel.

The Court: Who was?

The Witness: The owner was making over $2 a barrel.

The Court: Well, now, what I want to know is this: I want to know whether you have been stressing in your analysis the decision of the seller to a greater extent than you have been considering the situation of that willing buyer?

The Witness: I do not think so.

The Court: Well, I am trying to find that out.

Now, you say that this going concern, the Seattle Brewing & Malting Company, had been selling beer at that time in such volume and under such favorable results of management that a 75-cent royalty per barrel would be all right. But I want to know if you took into consideration the market on March 1, 1913, in the State of Washington?

The Witness: I did in this way:——

The Court (Interposing): Well, now, let me ask you this: Did you inquire into whether there were any contracts around the time of March 1, 1913, of an analogous or similar type where any buyer was agreeing to pay a royalty of 75 cents a barrel?

The Witness: Well,——

The Court (Interposing): Now, just answer that "Yes" or "No." Did you?

The Witness: No; no. [330]

The Court: Was the Seattle Brewing & Malting

(Testimony of Cornelius G. Weber.)

Company the largest brewing concern in Washington in 1913?

The Witness: It was, to the best of my knowledge.

The Court: I wonder if you could tell me whether you made a study, a comparative study of the sizes of other brewing companies?

The Witness: The brewery companies at that time——

The Court (Interposing): In Washington?

The Witness (Continuing): ——didn't release so much on barrel figures at the time. I know that the Olympia Brewing Company was a fairly good sized brewery.

The Court: Now, "fairly good sized" for an expert statistician and an engineer, I wouldn't think you would use the words "fairly good sized." I would think you would say, if you had studied it, you would make a more exact comparison between the sizes of the Seattle Brewing & Malting Company in Washington and other businesses in Washington at March 1, 1913.

Did you make a——

The Witness (Interposing): Other business generally?

The Court: Other brewing businesses, the same businesses, but in the State of Washington?

The Witness: I made a record, got a record of the number of breweries in existence in Washington at the time. [331]

(Testimony of Cornelius G. Weber.)

The Court: Well, have you that record here with you?

The Witness: Yes. I would have to search for it. I have it somewhere. I can't lay my hands on it quickly, but I can turn that in a little later, and not take the time now. All right, I will look for it now.

The Court: Well, if it doesn't take too long. I would like to know if you considered the position of other buyers in the State of Washington around the time of March 1, 1913?

The Witness: At that remote time I——

The Court (Interposing): What I want you to tell me is to what extent you considered the buyer's position? What would a willing buyer take into consideration?

The Witness: A willing buyer would take into consideration the money he could make out of it. Now, there were people in Washington——

The Court (Interposing): Well, now, that is a generalization. A willing buyer in the State of Washington would have to be a very concrete man.

The Witness: That is right.

The Court: He would have to be a man who knew something about the brewing business.

The Witness: That is right.

The Court: And he would either be a man who had been [332] in the business before, or who was going into it for the first time in his life.

Now, I want you to tell me in that fashion the way in which you considered the position of a will-

(Testimony of Cornelius G. Weber.)

ing buyer when you arrived at a conclusion that a contract would have been made between a willing buyer and a willing seller on March 1, 1913, under which a royalty of 75 cents per barrel would have been paid for the use of this trade name Rainier.

The Witness: In the absence of a definite market comparable for a similar condition I measured the market in this way: that all over the country, including the State of Washington, people were putting money in breweries. In many large breweries they were investing money, which had no particular indication that it would earn anything like even 10 per cent on the tangible assets. Now, here was something that was earning 20 per cent, and——

The Court: What was? The goodwill was earning 20 per cent?

The Witness: No, they were earning 20 per cent on the tangible assets.

The Court: Who was?

The Witness: The Seattle Brewing & Malting Company was earning 20 per cent on the tangible assets in the State of Washington.

The Court: All right, go ahead. [333]

The Witness: And it was over $2 a barrel.

Now, I would consider a very good return a dollar to a dollar and a quarter a barrel, and people that were putting their money into the business for less a return—I am very convinced that 75 cents a barrel would be a better bargain on a royalty basis for this than putting money in permanent as-

(Testimony of Cornelius G. Weber.)

sets earning less, so that the 75 cents would look to me like a very conservative figure.

The Court: Well, now, I want to be sure that I interpret your statement correctly, and that I understand it correctly.

That means to me that a person who had the opportunity to buy the entire Seattle Brewing & Malting Company business, including its list of customers, its equipment, its location, as well as its name and reputation, would be in a very good position and would make a very good investment if he entered into a contract under which he was to make payments on the basis of a royalty of 75 cents a barrel.

That is my understanding of what you have just said.

The Witness: No, it isn't quite that. It means——

The Court (Interposing): Well, you are talking about what the Seattle Brewing & Malting Company business was earning, and its earnings were a result of a combination of management applied to its assets, and management included the ability to get customers, to keep them and to sell to them. [334]

Now, it still appears to me that when you adopted 75 cents a barrel on a royalty basis as a way of arriving at the fair market value of the goodwill of this business as represented by the name Rainier on March 1, 1913, that you certainly must have had in mind a form of contract, or the terms of a con-

(Testimony of Cornelius G. Weber.)

tract that would be entered into between the buyer and the seller.

The Witness: There would have to be some arrangement.

The Court: And did you then have in mind the terms of a contract that would be made on March 1, 1913, in this hypothetical sale between a willing buyer and a willing seller of the goodwill of the business, and, if so, what were those terms?

The Witness: Well, the only other—the only concrete term, outside of what arrangements, practical arrangements had to be made, would be you could readily pay 75 cents a barrel or more.

The Court: What is this? The only concrete term would be or could be that the willing buyer would pay 75 cents a barrel?

The Witness: Some practical means on the basis of which he could market beer.

The Court: Well, to what extent did you go into it later? [335]

The Witness: Well, it would just simply mean that the Seattle Brewing & Malting Company is turning the beer sales in Washington over to some other person, and this other person then makes arrangements with them whereby they produce beer for which he pays the cost of the beer, whatever way it is paid for, is produced, and then sells it, and takes the profit, but for every barrel he sells he pays them 75 cents royalty.

Now, that 75 cents royalty on 172,000 barrels is $129,000 a year, and that capitalized at 12½ per

(Testimony of Cornelius G. Weber.)

cent would represent something like a million dollars.

It is more of a test than possibly the practical way in which this whole thing would have developed in an actual transaction, because, after all, there was no actual transaction at that time.

The Court: Well, did you have in mind the contract that was made in 1940?

The Witness: I took that into consideration. There was some indication there. But the indication in 1940 was far above what I used here in 1940. There was not any such volume as this volume here. Here they paid——

The Court (Interposing): I don't know what you mean by "here," and what "volume."

The Witness: In 1940 the company that paid the million dollars for release from royalty was making only [336] about—well, these are approximate, an approximate figure—130,000 barrels, where the Seattle Brewing & Malting Company was making 172,000 barrels.

The Court: When?

The Witness: For the State of Washington in 1913.

Now, on a barrel basis the release from royalty at 80 cents for everything above $125,000, and 75 cents for everything up to $125,000, represents a much lower capitalization rate than I used, because if I would use 10 per cent on the release from royalty I would get $1,290,000. But considering also that the new company is taxed and probably gets

(Testimony of Cornelius G. Weber.)

only 80 cents out of every dollar it saves through release from royalty, why,—they capitalized it practically at 8 per cent, so $100,000 capitalized at 8 per cent, it would be well over a million and a quarter dollars.

The Court: Well, of course, the contract in 1940 had provisions in it, did it not, that related to more than the purchase of the goodwill of the business?

The Witness: Well, to make it——

The Court (Interposing): Is that true? Are you acquainted with that contract?

The Witness: Not the details. To make the thing practical, I would assume there would have to be other arrangements. You can't just take this thing out, pull it out and let everything else hang on a limb. It wouldn't be practical. [337]

The Court: I am trying to find out what those other things are that you would have assumed a willing buyer would have taken into consideration in 1913.

The Witness: Well, in 1913 he would have had to pay, of course, more than a million dollars for whatever would have been necessary in a practical way to exploit this name. It would either have been a case of paying a million dollars for the name and part of the assets of the brewery, or making some arrangements whereby he would pay for beer bought from the brewery. But I don't think it would have been so practical, because they just pulled that name out. At least, the fellow couldn't have just parted with that name for a million dol-

(Testimony of Cornelius G. Weber.)

lars and the buyer would go and build a brewery or go to some other company and take the name with him, and then start off anew. In other words, the practical facts would seem—that his transaction would have involved more than a million dollars of its complete purchase all around, of which a million dollars would be assignable to the good will and the balance for whatever assets he purchased wherewith to carry on the business. You couldn't just with the name alone, and no practical means of exploiting it, do anything with it to make any money.

The Court: How many barrels of beer were being made by the Rainier Brewing Company in Washington in 1935?

The Witness: The Rainier Brewing Company in [338] Washington in 1935? It was under 100,000 barrels.

The Court: Making less in 1935 than in 1913?

The Witness: Did Rainier Brewing Company in Washington?

The Court: Yes. I understood they were making 172,000 barrels in 1913.

The Witness: They made 310, that was for the State of Washington. I am sorry that I didn't make myself clear.

The Court: Now, that is what I said, they were making 172,000 barrels for the State of Washington in 1913?

The Witness: That is right.

(Testimony of Cornelius G. Weber.)

The Court: Now, you say they were making less than that for the State of Washington in 1935?

The Witness: The Rainier Brewing Company in Washington in 1935 is a different company than the old company. They have occupied and rebuilt one of the smaller breweries that the old company had.

The Court: Well, the Rainier Brewing Company was the party to the contract that was made on April 23, 1935, that is, one of the terms in the contract, the buyer was going to pay a royalty of 75 cents a barrel, and Rainier Brewing Company, organized in 1932, grew out of the Pacific Products Company, and the Rainier Brewing & Malting Company, and so forth, I understand that.

The Witness: In 1935 they were selling less.

The Court: But you did not think that that made any difference in your process of evaluation? I haven't heard you mention before that there was any different situation because of those re-organizations of the company. Isn't that correct?

The Witness: It made for conservation.

The Court: What?

The Witness: I think it made for conservatism.

The Court: I mean that didn't enter into—you didn't consider that as a factor that would discount any figure one way or the other, that the company in 1932 and '35 was a different company than the Seattle Brewing & Malting Company in 1913? You haven't said you did.

The Witness: I took that into consideration, yes. It was a different company.

(Testimony of Cornelius G. Weber.)

The Court: Well, I was asking you how many barrels of beer were made for the State of Washington in 1935.

The Witness: By the Rainier Brewing & Malting Company that is now in Washington? I have to find my figures.

The Court: Well, did you take that into consideration in arriving at this value?

The Witness: Yes, yes, I did. It was considerably less than what the old company did, and they were paying, as a matter of fact, on a much higher basis than the [340] figures that I took into account, because when they first made the arrangements of paying a minimum of $75,000 a year they were selling, as I recall, about 60,000 barrels. They were then paying a royalty equivalent to about $1.25 a barrel.

The Court: Who was paying a royalty?

The Witness: The Seattle Brewing & Malting Company now existing in Seattle was paying that royalty to the Rainier Brewing Company in San Francisco.

The Court: In what year?

The Witness: I think that was the year '34 or '35. If I can find my record here, I have the barrels sold up to the time they bought, and the barrels sold after they bought the name.

The Court: Well, maybe you will have to look that up later.

(Testimony of Cornelius G. Weber.)

Now, let me ask you another question: I believe I understood you to say a few minutes ago that a willing buyer and a willing seller on March 1, 1913, probably would want to work out a contract under which property was being sold as well as good will, but that in such contract you would think they would allocate a million dollars as the value of the good will.

The Witness: Yes.

The Court: Now, you weren't—were you, in being given this problem, told to assume that such a contract was [341] being made in 1913 where both property and good will were being sold?

The Witness: I was not told anything as to how to make this valuation.

The Court: All right. Now, did you in your own mind then feel that you would have a different value if a willing buyer and a willing seller entered into a contract to sell and purchase good will alone? You would get one value under that kind of contract. And you would get another value for good will if this willing buyer and willing seller were making a contract to sell and to buy property plus good will?

The Witness: No, I didn't. I considered it the only practical way that I could see there could be a tranfer.

The Court: You didn't consider that there would be two values for good will under those two contracts?

The Witness: I considered that.

(Testimony of Cornelius G. Weber.)

The Court: Well, I mean the answer to that is "Yes" or "No". I mean, did you or didn't you? I want to know that.

The Witness: I considered it, but——

The Court: (Interposing) No. Did you consider that the value of good will under one contract would be different than the value of good will under the other kind of contract? [342]

The Witness: I considered that it would be different, and sufficiently different.

The Court: Well, now, how would it be different?

The Witness: They would be sufficiently different that there wouldn't be a practical transfer.

The Court: You mean that there wouldn't be a willing buyer and a willing seller for good will alone?

The Witness: Well, at this figure.

The Court: At $1,000,000?

The Witness: It wouldn't be practical to just rip that out and leave that brewery stand there with the remaining business. I wouldn't consider that practical.

The Court: Well, then, your value of a million dollars from good will you consider as the value that would be paid by a willing buyer and a willing seller if, under the contract, the brewery business itself in Washington and the good will were being sold, both together?

(Testimony of Cornelius G. Weber.)

The Witness: Sold, or a lease arrangement made in whole or in part, some practical arrangement so that you could commercialize this good will.

The Court: Well, would such arrangement be rather similar to the contract that was made in 1935?

The Witness: I didn't read the details of the contract beyond the things that I thought were necessary for this evaluation. Buy the brewery? Buy part of it? [343] Those were things that I considered incidental.

The Court: All right, that is all.

If there are no further questions, you may step down.

Mr. Mackay: The witness referred to Dr. Colvin's book, and we have some photostats with reference to what he has referred to.

I should like to offer those in evidence.

Mr. Neblett: No objection, your Honor.

Mr. Mackay: I might state, your Honor, that yesterday you asked Mr. Weber to make a computation, and it was rather complicated. He was unable to do it in Court. He has now made a computation, merely illustrative of how we arrived at it, only one year. I think probably it will assist the Court and everyone else if we could have this offered in evidence and withdrawn and substitute a photostatic copy of it.

The Court: Well, I think the only way to treat with that problem would be to have the witness say

(Testimony of Cornelius G. Weber.)

that he is now ready to answer the question and read into the record what he has written.

However, there has been an offer. Are you offering those pages as one exhibit?

Mr. Mackay: Yes, Ma'am.

The Court: Those are received as Petitioner's Exhibit 31.

(The documents referred to were marked Petitioner's Exhibit 31 and received in evidence.)

[Petitioner's Exhibit No. 31 appears in Book of Exhibits.]

Redirect Examination

By Mr. Mackay:

Q. Now, Mr. Weber, yesterday you were asked by the Court to make a computation.

A. That is right.

Q. And I will ask you if during the recess last night you have made a computation explaining that matter (handing document)?

A. (Examining document) It has already been mentioned before that the adjusted net worth is $2,903,028.06.

The Court: That is of the Seattle Brewing & Malting Company?

The Witness: Yes.

The Court: The entire business?

The Witness: That is right, of the tangibles.

(Testimony of Cornelius G. Weber.)

Now, it is a matter of allocating the net assets assignable to the State of Washington, and to show a computation which would tie up these figures.

In Washington the property consisted of a brewery which is proratable to both Washington and to business outside Washington. It also includes property belonging to Washington entirely, such as trucks, and things that tend to— [345] that were used for the local business. And there was land.

It so happens that the depreciation reserve on the books is one figure of $319,230.95, which for this particular purpose has to be prorated over three classes of property, brewery property in Washington, non-brewery property in Washington and property outside of Washington. So in order to prorate that I have to take from the total of the costs in these three classes of property the land in order to arrive at the depreciable property, then deduct depreciation to get the net amounts in these three classes of property, and thereafter allocate on the basis of sales, part of which are on a barrel basis and part of which are on a dollar sale basis.

So these figures will develop as follows:

We first have depreciable property in Washington, brewery property at cost, $1,409,722.63; non-brewery property in Washington, $387,726.24; outside of Washington, $119,788.86; total, $2,017,237.73.

Deducting depreciation respectively from the above set of four figures these deductions are as follows:

(Testimony of Cornelius G. Weber.)

Brewery depreciation, $223,159.09; non-brewery, property depreciation, $61,377.06; outside of Washington, $35,694.80; total, $319,230.95.

That then leaves net property as follows:

Brewery in Washington, $1,186,563.54; non-brewery [346] in Washington, $326,349.18; outside of Washington, $185,094.06; total, $1,698,006.78.

Adding back the lands to these classes of property we have after—well, here is the amounts of land to be added; Brewery, $86,056.05; non-brewery in Washington, $87,182.98; land outside of Washington, $83,598.13; total land, $256,837.16.

After adding the land we have the following totals in Washington: Brewery, $1,272,619.59; non-brewery, $413,532.16; outside of Washington, $268,-692.19; total, $1,954,843.94.

Then we prorate the $1,272,619.59 of brewery property in Washington on the barrel sales, which were 55.5 per cent of the total.

That will give for Washington business, assignable to Washington business, $706,303.87; outside Washington, $566,315.72; making a total of $1,-272,619.59.

Then add to the $706,303.87 the brewery property allocated to sales in Washington, the total of non-brewery property in Washington in the amount of $413,532.16, making a total fixed property amount for the business assignable to Washington of $1,-119,836.03. And adding to $566,315.72 the part of the brewery allocable to outside business an amount

(Testimony of Cornelius G. Weber.)

of $268,692.19, which is property outside of Washington, we get a total of fixed property outside of Washington of [347] $835,007.91, and a grand total of fixed property of $1,954,843.94.

Then we prorate inventory on the basis of barrels sold at 55.5 per cent to the State of Washington, and we obtained the following figures: For Washington, $370,662.54; outside of Washington, $297,-197.89; a total of $667,860.43.

Now, all other current assets excluding inventory in the amount of $483,832.10, are prorated on the basis of sales in dollars. The Washington sales accounted for 64.6 per cent of the dollar sales. So we obtain the following: For Washington, $311,-909.54; outside Washington, $180,922.56; total, $482,832.10.

Prorate deferred assets on basis of dollar sales, or 64.6 per cent to Washington, and we get for Washington $9,596.23; outside of Washington, $5,-258.62; total, $13,854.84.

Then we obtain a sub-total as follows:

Washington, $1,812,004.34; outside of Washington, $1,308,386.96; totals, $3,120,391.31.

Now we have left only current liabilities, and prorating current liabilities on the basis of barrel sales and deducting them from the foregoing sub-totals, we obtain the following deductions: Washington, $126,636.60; outside of Washington, $96,726.65; total, $217,363.25.

And we obtain the final figures of net assets as-

(Testimony of Cornelius G. Weber.)

signable to business within Washington and outside of Washington [348] as follows: Total for Washington, $1,691,367.73; outside of Washington, $1,-211,660.33; total combined, $2,903,028.06, which is the net worth figure from which we started.

The Court: Well, what is that figure?

The Witness: The net worth figure from which we started.

The Court: What is that figure?

The Witness: $2,903,028.06.

The Court: Well, I thought this all started by my asking you how you—oh, then you took 55.5 per cent of that last figure, is that right, and that gave you $1,750,000?

That is the way this all started yesterday afternoon.

The Witness: No; it is composed, the proration is composed of 55.5 per cent and 64.6. The grand average works out to about 58 and, I think about .4.

The Court: Well, that will do, I guess.

The Witness: I couldn't use it uniformly throughout but that is what it amounts, about what it amounts to.

The Court: We won't have you down to an exact decimal point.

The Witness: I adjusted—I didn't adjust, but for conservatism, instead of using the computed figure of $1,691,367.73, I used the round figure of $1,750,000. [349]

The Court: Now, are there any further questions? Have you any further questions?

Mr. Mackay: That is all.

Mr. Neblett: I have no questions.

The Court: Thank you, Mr. Weber, for making that explanation.

(Witness excused.)

The Court: And you have introduced all the exhibits you wanted to introduce at this time?

Mr. Mackay: Yes, your Honor.

The Court: All right. Then we will recess for lunch until two o'clock.

Do you want Mr. Weber to return, or do you want him to be excused?

Mr. Mackay: Mr. Neblett, do you want Mr. Weber any more?

Mr. Neblett: No.

The Court: Two o'clock.

(Whereupon, a recess was taken until 2:00 p.m. of the same day.) [350]

Afternoon Session, 2:00 p.m.

Mr. Mackay: Mr. Forbes, will you please take the stand?

JOHN F. FORBES,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your full name?

The Witness: John F. Forbes, F-o-r-b-e-s.

By Mr. Mackay:

Q. Mr. Forbes, will you please tell the Court your occupation?

A. I am the senior partner of John F. Forbes & Company, certified public accountants.

Q. And how long have you been that?

A. Ever since the firm was organized, I think in 1934.

Q. I see. And prior to that time what was your occupation?

A. Prior to that time just—you mean immediately prior to that time?

Q. Yes.

A. Immediately prior to that time I was—I had retired.

Q. Well, prior to that time—how long have you been an accountant, certified public accountant?

A. I took the CPA examination in 1905.

Q. And you practiced accounting at that time except for the short time that you were retired?

A. Yes, sir.

Q. And does your office have an office in Seattle?

A. Yes, sir.

(Testimony of John F. Forbes.)

Q. How long has it had that office, do you remember?

A. Oh, seven or eight years, I should say.

Q. And prior to that time did you make frequent visits to Seattle?

A. I have been making visits up there since 1906.

Q. Since 1906 for whom?

A. On professional business.

Q. And during that earlier period prior to the time of the organization of your firm with what firm were you connected?

A. For twenty years, exactly twenty years I was a partner in the firm of Haskens & Sells.

Q. Haskens & Sells? A. Yes, sir.

Q. That is a nationally known accounting firm, is it not? A. Yes, sir.

Q. And did that firm maintain an office in Seattle? [352] A. Yes, sir.

Q. And when you went to Seattle did you go to supervise that office?

A. I opened that office, yes, and put some of my people in it.

Q. I see. What are your educational qualifications, Mr. Forbes?

A. Qualifications for what?

Q. Well, your education, I say?

A. Well, my professional education was about this: Somewhere between 45 and 50 years ago I thought that I would like to be a lawyer and study law, and I wanted to go to work at it, so I asked a

(Testimony of John F. Forbes.)

family friend for a job in the law department of the Southern Pacific, and I was told I could have it. So when I wanted to go to work in the Southern Pacific I went to see this friend, who was Mr. Willcutt, the Secretary, and Mr. Willcutt said, well, Mr. Creed Hayman, who was the General Counsel of the company, was in Washington trying a case and wouldn't be back for two months.

But, "In our office here, why, we have something we would like to have you do. We have an English barrister here and he will supervise your work. The work consists of going through the deeds of trust of about 140 companies to determine whether the terms of the trust deeds have been [353] carried out by the companies."

So I went to work at that, and in about three weeks, inasmuch as I never had anything to do with accounts and became very much fascinated by them, I went to Mr. Willcutt and said if it was all right with him I would abandon the law and take up accounting because it fascinated me to such an extent. And I began——

The Court (Interposing): Three weeks was enough?

The Witness: Those three weeks.

And I began to study accounting. There weren't any books in this country, so I had to send to England, and during a number of years I stayed with the Accounting Department with the Southern Pacific, and in the meantime the CPA law had been

(Testimony of John F. Forbes.)

passed, and I took the CPA examination and opened in 1906, January 1906, an office for the practice of public accounting in San Francisco.

I practiced in San Francisco, and up and down, as my clients developed, up and down the Pacific Coast, and spent a great deal of time even at that time in Seattle, was perfectly familiar with the Pacific Coast conditions.

I had to take a CPA examination in Seattle because they didn't have any reciprocity agreement with California. So I have spent a good deal of time there.

In 1907 I was invited to a position on the faculty of the University of California, and for 30-odd years I [354] lectured as a member of the economics faculty of the University of California in the fields of accounts, commerce and finance. When I happened to be away and I was——

The Court: Under Dean Hatfield?

The Witness: I beg your pardon?

The Court: Under Dean Hatfield?

The Witness: Under Dean Hatfield, yes. He was the one who negotiated it in the first place, and he and I have been very close friends all these years.

In 1909 I was appointed to the State Board of Accountancy, and I think that the law was changed last week, but I think I am still a member of the State Board of Accountancy. I have been the President of it for a great many years.

In 1912 I bought an interest in the firm of Haskens & Sells. Haskens & Sells was the leading

(Testimony of John F. Forbes.)

American firm of accountants, and one of the principal international firms of accountants. And I found that accountants from New York and London (because San Francisco and the Pacific Coast was financed very largely through New York and London) were affecting my practice, and that I had to be associated with a New York and London firm. So I entered that firm and continued with them until I retired after having been a partner in that firm for exactly 20 years, 20 years to the day, in accordance with the plan. I hate to use that word, [355] but we planned it that way. But exactly in accordance with my plans I retired.

In the meantime I had practiced my profession pretty nearly everywhere north of the Equator. I have practiced it, as we opened offices in the Orient. I happened to be a CPA of the Philippine Islands because I practiced there a great deal. I practiced in Shanghai, I have practiced in Paris and London, and at the time of the rubber debacle I had to go to London, at the time of the sugar debacle I had to go to Havana, at the time of the piece goods debacle I had to go to Shanghai.

I have practiced nearly everywhere north of the Equator. Part of the time I had to stay in New York and have charge of all of the offices outside of New York. We have between forty and fifty offices outside of New York, and they were under my charge, and all of the questions which came up each minute I had to take care of.

(Testimony of John F. Forbes.)

Now, this matter of good will——

By Mr. Mackay:

Q. (Interposing): Just a moment, Mr. Forbes.

A. Yes.

Q. Do you belong to any civic organization, participate in any civic organizations around California?

A. I don't quite understand that question.

I am on the Finance Committee of Orphan Asylums, and the Finance Committee of Hospitals, and I don't know [356] just exactly what you mean.

Q. Well, that is what I mean.

A. Oh, yes! I am the Treasurer of the USO, that is, the local USO. I am the Treasurer of the California War Chest, I am the Treasurer of the Red Cross War Drive. I can't tell you how many things I am Treasurer of, but——

Q. (Interposing): Well, now, Mr. Forbes, in your professional experience you had occasion to make values, determine values of property, or stocks, including good will?

A. That is, have I had occasion to appraise it?

Q. Yes, sir.

A. That is my principal occupation, yes.

Q. Well, will you please tell the Court, and be as specific as you can, just the extent of your activities along that line, particularly during the last several years.

A. Well, ever since I have commenced practice and have prepared balance sheets of companies, and have certified to the balance sheets, I have had to

(Testimony of John F. Forbes.)

appraise the values of these balance sheets, by that I mean appraising the value of the various assets, tangible and intangible which appear upon the balance sheets.

That is a fundamental part of the work of a public accountant. And that work has continued right up to the very minute. I have just finished testifying—I testified for three months in this Pacific States Building & Loan case, [357] having appraised the value of the building and loan for the Court, not for any of the interested parties.

I should say that I had a very, very wide experience in the appraisal of——

Q. (Interposing): Well, you have testified in other cases than Pacific States, haven't you?

A. Have I what?

Q. You have testified in other cases other than the Pacific States? A. Literally——

Q. (Interposing): With respect to the fair market value of intangibles, including good will?

A. Well, I won't say that I have testified in hundreds of cases, but I have prepared literally thousands of appraisals upon good will.

Q. Yes.

A. You know, in this State for very many years it was the custom when a corporation was formed, when we had par value stock, to issue the par value, to issue the stock fully paid, and very, very often there weren't assets, tangible assets in sufficient quantity to offset the fully-paid stock. So it was the custom among all lawyers to cause a good will

(Testimony of John F. Forbes.)

to be set up. So that in the early days, when there was a great deal of mining carried on, a great many mining corporations in this State, and later when there were a great many oil corporations [358] in the State many, many of them had this element of good will, and in setting up a balance sheet, why, you had to determine whether it was good will as a value or whether it was good will as a merely nominal affair. But it was necessary always to make an investigation to determine just exactly what the situation was with reference to good will.

Q. Yes.

A. I have been engaged very often in fixing the good will of companies. For instance, some years ago Mr. Hearst wanted—was sold on the idea by some New York and California bankers it would be a good idea to borrow some money on some of his newspapers and magazines by the issuance of bonds. So they arranged with Mr. Hearst and the bankers to issue twelve millions of dollars worth of bonds on five of his Pacific Coast newspapers and five of his magazines, including the Cosmopolitan and that sort of thing. When they had a consolidated balance sheet prepared of these various elements they found they had about five millions of dollars worth of tangible assets against which it was necessary to issue twelve millions of dollars worth of bonds.

Obviously, the element of good will had to enter in there, and I was retained by the bankers to establish the good will on those Hearst newspapers. The bonds were issued upon the basis of that good will.

(Testimony of John F. Forbes.)

Subsequently, I appraised the good will of all of the [359] Hearst newspapers, and that good will was attacked about two or three years ago in the Federal Courts, and the values that I fixed were sustained by the Federal Courts in Los Angeles within the last two or three years on all of the Hearst papers.

Q. Did you testify in that case?

A. No, no, I didn't testify. I turned in a report, and the report supported the entries which had been made upon the books, and the Federal Judge down there said there was not any sense of my going down to testify, that he was satisfied.

Q. Well, now, you are familiar, of course, with the Rainier Brewing Company, are you not?

A. I am very familiar with the Rainier Brewing Company for a variety of reasons. The principal reason is that they have been a client of ours for many years. We have audited their accounts, we have prepared their tax returns, and during the last several years I have been asked to sit on their Board of Directors as a sort of technical director. I have no financial interest in the company. But I have a very great interest because they are clients of ours.

Q. Yes.

A. I may say that I have acted as a director of a great many of our clients, and it is solely since the recent rulings of the SEC that I have retired from the [360] Boards of most of them. The SEC objects to a director also acting as an auditor, not-

(Testimony of John F. Forbes.)

withstanding the fact you have no financial interest and hold merely a technical position.

Q. Well, you have made appraisals for commercial transactions, haven't you, or reorganization of corporations?

A. Oh, dozens and dozens of them, yes.

Q. Now, Mr. Forbes, I show you Petitioner's Exhibits 13, 14, 15, 16, 17, 18, 19, 24, 25 and 27, and I will ask you if you are familiar with those exhibits?

A. (Examining documents): Yes, all these that represent statements were prepared in our office.

Q. Under your supervision?

A. Yes, sir.

Q. You are entirely familiar with them?

A. I was when they were made.

Q. Yes.

A. There are a great many of them.

Q. Well, you have examined them since you came in Court today, haven't you?

A. Yes, sir.

Q. Now, have you made an investigation to determine the fair market value on March 1, 1913, of the good will inherent in the trade name Rainier in the State of Washington [361] and Territory of Alaska? A. Yes, sir.

Q. And will you please tell the Court what investigations you have made and what facts you took into consideration to make that appraisal?

The Court: May I ask at this time, Mr. Mackay,——

Mr. Mackay: Yes.

(Testimony of John F. Forbes.)

The Court: ——what you contemplate in asking the witness to testify about the fair market value of the good will inherent in the trade name Rainier? There was a contract made in 1935, which is the underlying contract which gives rise to the main issue in this proceeding, as I understand it.

Mr. Mackay: Yes.

The Court: And I think that is Exhibit 1.

Mr. Mackay: Yes.

The Court: And that contract, as I understand it (although I have not read it through) provides for the purchase by Century of certain property in Seattle, which comprised a brewing plant, is that correct?

Mr. Mackay: Yes, your Honor.

The Court: And there were features in this contract under the title of "Licensing Agreement," under which Rainier granted Century the sole exclusive right to market beer and malt beverages within the State of Washington and [362] Territory of Alaska under the trade names and grants of Rainier and Tacoma, and, of course, there were other provisions. The contract is in evidence and I am not attempting to state the provisions of that contract.

Now, I think that it ought to be made perfectly clear, and that you should make it perfectly clear, because the issue is one in which you are trying to establish fair market value, whether you are dealing with this concept of the fair market value inherent in the trade name of Rainier as an abstract matter, as property subject for sale, as property subject

(Testimony of John F. Forbes.)

for sale entirely separate from the sale of other property, or as property subject for sale in connection with other property.

The question is so broad that I find it difficult to know just exactly what the expert is asked to express his opinion of value about because the term "good will" is abstract.

Mr. Mackay: Yes.

The Court: And in the instance of the first expert which you produced you did not ask a hypothetical question, nor did you ask any question which would indicate the area within which the witness was to express an expert opinion. I think that is unsatisfactory. You asked the witness to express an opinion, and then you asked him to explain how he arrived at his opinion, and I found it rather difficult to [363] know, from listening to the testimony, just exactly the limitations on the subject that was before the witness and before the Court.

Do I make myself clear?

Mr. Mackay: Yes, your Honor. I am glad to get that observation.

What we are trying to do, if your Honor please, is to establish the fair market value on March 1, 1913, of the trade name Rainier.

The Court: Well, for what purposes?

Mr. Mackay: For the purpose of establishing a March 1, '13 value cost of what we sold in 1913 and '40.

The Court: Well, that is true, but the thing that troubles me is this: that in asking the witness a

(Testimony of John F. Forbes.)

question you do not put into the question anything that will, for purposes of this record, indicate the elements that he should be considering. Now, this witness has already stated that under certain circumstances it is a very important thing that you value good will when you are setting up a balance sheet of a corporation.

I can imagine that the valuation of good will of the business can be of various meanings.

Are we to value the good will of a business as a going concern? Are we to value the good will of a business under the liquidation of the business? Are we to value the [364] good will of a business in connection with the sale of an entire business? Are we to value the good will of a business in connection with the sale of a trade name?

Now, the last witness indicated that in his experience he did not know very many instances where a trade name had been sold, but he did indicate that he had known that the trade name "Dodge" was one sold, that name which is used by an automobile manufacturer.

Now, in the instance of the sale of a trade name to a manufacturer of the same product, or to a manufacturer who is going to duplicate the product under which the trade name formerly appeared would involve special problems.

Mr. Mackay: Yes, your Honor.

The Court: And I don't want to wait until this case is submitted to find out the nature of the term "good will" as we are using it in this case. As I

(Testimony of John F. Forbes.)

understand the issue in this case, it might be that the question of the fair market value of the good will inherent in the trade name Rainier on March 1, 1913, may not even have to be considered, that, in one sense, it is an issue which has to be considered depending upon the determination of some other issue.

Isn't that correct?

Mr. Mackay: Yes, your Honor.

The Court: Well, then, it may not be necessary to actually consider the question. But if it does become [365] necessary to consider the question then I think that I am correct in requiring now that you make it perfectly clear in asking the witness to give his opinion of fair market value, of some concept of good will in the area, of several concepts of good will.

Mr. Mackay: If your Honor please, I appreciate that observation, and if permitted, I think I will bring that out by the witness. I think he can do it by telling his conception or his process of determining the value of a trade name.

The Court: No, I have a real objection to your proceeding in that way. I think that if you produce an expert and ask him to express an opinion on value, it is your first duty, and it is absolutely essential, that you tell the expert what property is to be valued.

Now, I don't wish to hear a dissertation on the general problem of valuing good will in all kinds of businesses and under all kinds of circumstances.

(Testimony of John F. Forbes.)

I have some acquaintance with the general subject, and I know that it is a very interesting subject.

But what I want to know is: What you are asking this witness to take into consideration for the purposes of the question in this case.

Now, it is your theory that the good will inherent in the trade name Rainier as of March 1, 1913, is to be [366] valued under facts which would presuppose that a contract similar to the contract executed in 1935 was being executed in 1913?

Mr. Mackay: That may not be my purpose here, if your Honor please. If I may explain, my purpose is to develop by this witness what the fair market value in 1913 of the trade name Rainier was, and under the conditions as a going concern.

The Court: In the abstract? Do you mean for the purposes of the Rainier Brewing Company itself?

Mr. Mackay: No, for the purposes of the Rainier Brewing Company of Seattle at that time, as well as the value to a purchaser. In other words, if they were going to buy that I would want to consider the purchaser's ability to buy, and his condition there with respect to the use of that, as a usable going——

The Court (Interposing): Well, you have never yet put such elements into the question which you are giving your expert. You have been asking your experts, the first one and this witness, the most general question: What would be your opinion of

(Testimony of John F. Forbes.)

the—I have it written here—the fair market value on March 1, 1913, of good will inherent in the trade name Rainier.

Now, that is as much as you put into your question, and it is too broad. [367]

Mr. Mackay: Well, I will try to be more specific on that, Your Honor.

The Court: I may say that the Court reserves the right to analyze the reasoning of the witness even though he is an expert.

Mr. Mackay: Oh, surely, there is no doubt about that. We want you to.

The Court: And the Court cannot analyze the reasoning of the witness unless we know exactly what the witness is considering. It isn't fair to the expert and it isn't fair to the Court, unless we know exactly the elements which this witness is supposed to take into consideration.

Mr. Mackay: That is right.

The Court: Now, if you mean that the witness is to give us an opinion supposing that the Seattle Brewing & Malting Company on March 1, 1913, wanted to sell its trade name, all right.

Mr. Mackay: That would be implied in that. I intended to do that.

The Court: But that ought to be in the question. And if you want him to express an opinion of value as to what would be the fair market value in general, that is one thing. The value, it appears to me, might be different if one of these willing buyers wanted to purchase the trade name to use in a simi-

(Testimony of John F. Forbes.)

lar or identical business. He might [368] have some other reason for wanting to buy the trade name. He might want to bury it. He might want to license it. It it conceivable that the value might be different depending upon the circumstances.

At best we are dealing with an abstract proposition inherent in this kind of case. The fact is that no one actually sold or bought the Rainier name on March 1, 1913, so we are dealing with a hypothetical and theoretical proposition anyway. But I think we ought to try and overcome that handicap by making the proposition as specific as we can.

Mr. Mackay: Yes, Your Honor, I will try and make it specific.

I might state a willing buyer, we are trying to develop here, in order to say that it has a fair market value, would be one who would be fully acquainted with all the facts and have a use for it, either to use it as he——

The Court (Interposing): You might say so now to me, but my point is that you haven't said so heretofore in your question to your experts. I know what the definition of fair market value is.

By Mr. Mackay:

Q. Mr. Forbes,—Pardon me.

May I have that last question?

The Court: Well, I am going to ask you, Mr. Mackay, [369] to begin all over again.

Mr. Mackay: Yes, I intended to. I just wanted to get my thought so I wouldn't repeat that.

(Testimony of John F. Forbes.)

By Mr. Mackay:

Q. I think you have stated, Mr. Forbes, that you have examined the—are familiar with the financial records of the company, the Seattle Brewing & Malting Company? A. Yes, sir.

Q. That I have called your attention to here?

A. Yes, sir.

Q. Were you also familiar with the business conditions up in Seattle in 1913? A. Yes, sir.

Q. What factors did you take into consideration—well, I will withdraw that.

I think you have already stated that you have made an appraisal of the fair market value of the trade name Rainier as of March 1, 1913?

A. Yes.

Q. What factors did you take into consideration?

A. The general economic history of the company, the general conditions which surrounded the company as of March 1, 1913.

Q. Did you give consideration to the earnings, average earnings over a period of years prior to 1913? [370] A. I did, yes.

Q. What period did you use?

A. Well, I examined the—looked into the earnings since the organization of the company in 19—let's see—1893, wasn't it? No, 1903. No, that is it; 1893. But for the purpose of establishing the value of the goodwill I took in the five years ended June 30th, 1912.

Q. Now, in trying to determine that value, did you take into consideration the value merely in the event of a sale of the whole business or part of the

(Testimony of John F. Forbes.)

A. That is in considering the value of the goodwill?

Q. Yes.

A. I considered the value of the goodwill from the viewpoint of what I thought it would be worth assuming someone wanted to sell it; just as it had been sold in 1940.

Q. Did you also take into consideration the buyer's position?

A. Yes, of course. I assumed that there would be a willing buyer and a willing seller.

Q. And that that willing buyer could use the trade name? A. Exactly.

Q. Either for conducting a brewery business under that trade name——

A. (Interposing): For any purpose. [371]

Q. For any purpose?

A. Having to do with that goodwill.

Q. I see. Now, in arriving at that value did you take into consideration the going concern value at March 1, 1913? A. Yes, it was based——

Q. (Interposing): I beg your pardon?

A. It was based upon the theory that it was a going concern.

Q. Yes, that is what I was trying to bring out.

A. Yes, sir.

Q. And I think you stated you took into consideration the earnings for the five years immediately preceding? A. Exactly.

Q. And for what period was that, what fiscal years?

(Testimony of John F. Forbes.)

A. For the five years ended June 30th, 1912.

Q. 1912?

A. Yes, that being the last full fiscal period before March 1, 1913.

Q. Well, why wouldn't you take into consideration the earnings from June 12, 1930 to March 1,—I mean June 30, 1912 to March nineteen hundred and——

A. (Interposing): Well, it would have involved a great deal of work with a very small difference.

Q. But you are familiar, are you not, with the earnings [372] for 1913? A. Yes, sir.

Q. As well as the balance sheets?

A. Yes, sir.

Q. Did you also take into consideration the balance sheets for the year that you have talked about?

A. Yes, it was necessary to do that in order to find the value of the tangible property.

Q. Well, what analysis did you make?

A. We analyzed completely from the records the value of the tangible property as distinguished from the total value.

Q. Well, now, Mr. Forbes, the Seattle Brewing & Malting Company in 1913 had its breweries in Washington, and it also operated outside of the State of Washington.

Now, in your analysis of it did you take into consideration all the assets and income of the company?

A. Yes, yes, in order to ascertain the figure I wanted it was necessary to determine what the av-

(Testimony of John F. Forbes.)

erage assets were for a five-year period, the average tangible assets. In ascertaining them I had to ascertain what the profits were for a similar period. I allowed a return——

Q. (Interposing): Well, just a moment on that.

A. Yes, sir.

Q. How did you make an allocation between Washington—— [373]

A. (Interposing): I was about to explain that.

Q. Oh, I am sorry. I didn't understand.

A. I said in order to ascertain the total amount of the goodwill I had to use, of course, the total amount of the property, of the tangible properties and the total revenue for the period.

Q. That is inside and out Washington?

A. Yes. Now, that gave me an all-over goodwill. The proportion of that goodwill——

The Court (Interposing): Just a minute, please. What gave you an all-over goodwill?

The Witness: The determination of the return on the tangible properties and the capitalization of the assets, of a reasonable return on those assets.

The Court: Well, I think you——

The Witness (Interposing): Do I make that clear?

The Court: I think you could develop that a little more.

Your return on assets would, I suppose, mean the profit of the business?

The Witness: Yes. Now, for instance, we developed the fact that the average tangible assets

(Testimony of John F. Forbes.)

for the company amounted to $2,519,000 plus. I thought that a reasonable return on that amount, a very reasonable return would be [374] 8 per cent. A general survey of the brewery business throughout the country at that time developed the fact that breweries were earning somewhere in the neighborhood of 6, so that on the basis of 8 per cent, why, I allowed a very good—what I figured was a generous return.

The average earnings over the five-year period amounted to $383,000 a year round figures, the return on the tangible assets $201,500, leaving an excess earnings which would be attributable to the goodwill of $181,500. That would be the average annual earnings attributable to the goodwill.

Now, it seemed to me that if anyone was going to buy that goodwill——

The Court (Interposing): If anyone was going to buy the business?

The Witness: I beg your pardon?

The Court: If anyone was going to buy the business?

The Witness: Well, in this particular case, Your Honor, I think the business and the goodwill would have been identical because the business consisted almost essentially of selling Rainier beer.

The Court: Well, let me ask you this: Is this method that you are describing a standard method for arriving at a value of goodwill? [375]

The Witness: Yes, it is.

(Testimony of John F. Forbes.)

The Court: Is this the method that you use if you are making up a statement of the—well, if you were making up a balance sheet for the business don't you in some of your businesses in this area actually carry goodwill as an asset?

The Witness: Yes, some companies do, but——

The Court (Interposing): I think it may not be a practice in recent years, but I think many years ago goodwill often was carried as an asset.

The Witness: It very frequently is carried now.

The Court: Well, now, let me ask you this: Would you, for the purposes of arriving at a figure for the book value of goodwill, is this the method that you would follow, that is, of taking the average earnings of the business over a period of years and figure out how much of those earnings would be attributable to the tangible assets of the business, and allocating then the rest to goodwill and capitalize it?

The Witness: That is right, but——

The Court (Interposing): And you would apply the same method then in this problem of determining what the value of the goodwill of this business was on March 1, 1913?

The Witness: That is right. [376]

The Court: In a transaction where a willing buyer and a willing seller wanted to deal in just the trade name?

The Witness: Precisely.

The Court: Just the trade name is going to be sold?

The Witness: That is right.

(Testimony of John F. Forbes.)

The Court: Well, I would like you to explain that to me because I don't follow you on it. If I have no brewing business it is immaterial to me that the accountants, when they set up a goodwill figure on the balance sheet of the Seattle Brewing & Malting Company, arrived at a figure for goodwill by taking actual earnings and tangible assets of the Seattle Brewing & Malting Company.

The Witness: Well, of course,——

The Court (Interposing): The Seattle Brewing & Malting Company is not being sold, and I, a willing buyer, am not buying those tangible assets of the Seattle Brewing & Malting Company. All that I am buying is the name.

The Witness: That is right, but that name is a very valuable name because it——

The Court (Interposing): I want to know how you can value it. It seems to me that that method that you are following suggests more the method that would be followed in setting up a goodwill figure on the books of the Seattle Brewing & Malting Company as a going concern. It isn't a [377] method that you would follow if you were selling the name itself.

The Witness: Well, as a matter of fact, you would not set up upon the books of a company the element of goodwill unless it was—that is, an arbitrary entry would never be made. As a matter of fact, the SEC has suggested that all companies carrying goodwill upon their balance sheets, because it is an intangible, write it off.

(Testimony of John F. Forbes.)

The Court: That is right, in recent years it is not considered a good practice.

The Witness: That is right.

The Court: So that is why I asked you whether it was a practice that you were acquainted with some years back.

The Witness: No, frankly I never have known of a case where goodwill has been set up upon the books as a purely arbitrary matter. I have known a great many cases where goodwill has been set up on the books as a result of consolidation or the result of purchase.

The Court: Well, it is a figure that does appear upon balance sheets of businesses, particularly in earlier years?

The Witness: Oh, yes, yes. For instance, if some corporation in Seattle wanted to buy that goodwill and pay [378] as, in fact, the Rainier people did pay, a million dollars, or the Seattle people did pay a million dollars for it, I think that million dollars should be set up on their balance sheets because it represents the cost of an asset which they have purchased.

The Court: Well, getting back to the point, your statement of the method you were following suggested to me the method that would be followed if we were valuing goodwill of this business for purposes of determining what goodwill was as an asset of the Seattle Brewing & Malting Company.

The Witness: Exactly.

The Court: That is my point.

(Testimony of John F. Forbes.)

The Witness: That is what I am trying to——

The Court (Interposing): Well, now, the value of goodwill to the Seattle Brewing & Malting Company when it retains the name and carries on its business in exactly the same way as it has before is one thing. It seems to me, logically, the value of the goodwill inherent in the name Rainier is another thing when a buyer comes along and proposes to buy only that name and none of the other assets of the business.

Now, what are you taking into consideration? Are you considering as your transaction in 1913 the sale of the name Rainier without any other assets of the business, or [379] are you considering the sale of the name Rainier along with tangible assets of the business?

The Witness: No.

The Court: The name being an intangible asset?

The Witness: No, I am considering it from the—not with reference to its association with the company which owned it, but purely as a separate entity which might be sold without regard to the properties of the Seattle Brewing Company.

The Court: Then I don't see why a willing buyer would want to capitalize an 8-per cent reasonable return on tangible assets of $2,519,000.

The Witness: Well, I will try to explain.

The Court: Because I don't know if the business that I am going to use Rainier in is going to have tangible assets of $2,519,000.

The Witness: No, but you do know this:——

(Testimony of John F. Forbes.)

The Court (Interposing): And I am sure that the earnings produced by the Seattle Brewing & Malting Company over that five-year period before 1912 that you took into consideration were produced by management, by tangible assets, as well as by the value of that trade name Rainier Brewing Company.

The Witness: Well, now, all of those things are contemplated in it, permitting the corporation to earn on its [380] invested capital.

Now, here is a corporation with two and a half million dollars invested. Let's say that it wants to sell its goodwill. If it sold its goodwill it would probably go out of business, but let's assume that it wants to sell its goodwill and some other corporation wants to buy it. As a matter of fact, that is precisely what was done in 1940 by the other company. We assume then we want to find what that goodwill is worth.

Well, what is it worth? What is it based upon? It is based upon——

The Court (Interposing): Well, we are asking you.

The Witness: Well, I am asking myself now.

It is based upon its ability to make money. That is why they buy it. It is based purely upon its ability to make money.

The Court: The ability of the name to make money?

The Witness: Right.

The Court: Right.

The Witness: The ability of the name to make money.

(Testimony of John F. Forbes.)

Now, we assume that any brewery making any kind of beer will get a certain return upon its investment. At that time it was around 6 per cent. For purposes of this contemplation I have fixed the return at 8 per cent. The normal [381] business, with any kind of beer, throughout the country was permitted to earn 6 per cent. It might be a little bit more or it might be a little bit less, but it was in the neighborhood of 6. Therefore, to be generous I fixed a value of 8 per cent on the return on that investment.

Now, anything in excess of that normal or generous return is earnings which were incidental to this particular object, this name.

Now, the point is: What is that worth? We say that in that period the earnings of this company which had manufactured the Rainier beer were $180,000 a year in excess on a normal return, that that $180,000 was attributable altogether to the value of this trade name.

Now, we say there is an income of $180,000 which is attributable to this name, entirely attributable to it. It might be a little bit more, but certainly that amount is attributable to the name. So we want to find the value on a reasonable basis of that $180,000 worth of earnings. This is purely a financial problem. We are trying to give a value to this element which has earned $180,000 a year for the five preceding years.

We capitalize it in order to give it a value. Now, the basis of the capitalization would vary. It would

(Testimony of John F. Forbes.)

vary with the times, it would vary with the business, it would vary with the location. Money is high and money is [382] low.

For instance, 2 per cent—2½ per cent is a fine return right now, and we are delighted to get it on a government bond. A few years ago 4 per cent Liberty Bonds were selling for 85, which made an earning of 5 or 5½ per cent. All of those things have a bearing upon it.

But I think it is my judgment, and based upon my experience at that time, that a return of 12½ per cent, a capitalization of this amount, 12½ per cent, it would be worth some value through which 12½ per cent would produce $180,000 a year, and that is the value of this goodwill.

Now, as it happens——

The Court (Interposing): Well, what does that come to? What is it, then, capitalized at 12½ per cent?

The Witness: Capitalized at 12½ per cent it would be $1,450,000. But in this particular case only a portion of the goodwill was sold, and that was the portion of the business within Washington and Alaska. That business made upa little over 80 per cent.

Let's assume that 20 per cent—which I have done—one-fifth of that goodwill is attributable to the business outside of Washington.

The Court: One-fifth?

The Witness: Yes, yes. And in round figures that [383] will give you $1,150,000.

(Testimony of John F. Forbes.)

Now, that is, as I see it, a value which could be placed upon that, this earning power, eliminating the business outside of Washington and Alaska.

The Court: That would be $1,150,000?

The Witness: Yes, yes. Of course, that is based upon a return, or a capitalization on the basis of 12½ per cent. That is a very generous and a very, very fair appraisal of that goodwill.

The Court: That is generous to the seller, isn't it? It would be a good price for a seller to get? Would a willing buyer be willing to arrive at a price that would be based on a 12½ per cent capitalization?

The Witness: Yes, I think a willing buyer would be tickled to death to be able to earn 12½ per cent on his money.

The Court: Well, that is not the point. The point is whether a willing buyer would be willing to pay that price to a willing seller?

The Witness: I don't think there would be any question but that a willing buyer would want to buy that, pay that, because the similar thing was sold for a million dollars in '40. They did pay a million dollars for it.

The Court: Just because you pay a high price for it is no assurance that your earnings are going to be high? [384]

The Witness: We have shown that this name Rainier will of itself earn in excess of $180,000 a year. Now, certainly that $180,000 a year earning must have a value. That is axiomatic. Now, there

(Testimony of John F. Forbes.)

might be a lot of ways of valuing of that, that $180,000. If, for instance, you assume that capitalization of 10 per cent would be fairer—and I may say in capitalizing the Hearst newspapers—I have forgotten—sixty or seventy of them, I worked upon the theory that a capitalization of 10 per cent was desirable. That would be a lesser return than we are calculating here.

By Mr. Mackay:

Q. Now, Mr. Forbes——

The Witness: (Interposing) Well, I just want to be clear. I want her Honor to be clear on this thing because——

The Court: (Interposing) I am thinking about what a willing buyer would want to buy. I am thinking about our definition of a fair market value, a willing buyer and a willing seller. I am thinking of what a willing buyer would buy.

The Witness: You have a case absolutely in point, you have a case of a willing buyer who bought this identical thing in 1940 for a million dollars.

By Mr. Mackay: [385]

Q. Well, Mr. Forbes, in 1913 will you please tell the Court whether, in your opinion, that a willing buyer of the trade name Rainier for the State of Washington and the Territory of Alaska—whether, in your opinion, a willing buyer would have been willing to have arrived at the sales value or purchase value of that on the basis that you have described?

(Testimony of John F. Forbes.)

A. I know that if anyone wanted to buy that property they would have been delighted to have paid that price for it.

Q. And to arrive at that value would they have taken into consideration the same factors?

A. The same factors which I have taken into consideration.

Q. Yes. That is the earnings record and all of the Seattle Brewing & Malting Company——

A. (Interposing) Exactly.

Q. Well, now, you have spoken about good will there. Did I understand you to say that that was all attributable, in your view, to the trade name Rainier?

A. I would assume that it was. I think so, yes. I don't think there is any question about that.

The Court: What was that?

Will you read the question again, please?

(The question referred to was read by the Reporter.) [386]

By Mr. Mackay:

Q. Of course, in determining the fair market value of a trade name the most important thing to take into consideration is the earnings, isn't it?

A. Yes, sir.

Q. Because that either reflects an earning in excess of the tangibles or it doesn't?

A. Naturally, that is the most important thing.

(Testimony of John F. Forbes.)

If there weren't any earnings, they wouldn't want to buy the property.

Q. That is right. Then how else do you think a fair market value of a trade name could be arrived at unless you did take into consideration the earnings?

A. Well, there isn't any other way that I would undertake it. There may be other ways. The subject might be approached entirely different from an engineering point of view. I am not familiar with that.

Q. Is it your opinion that a willing buyer of the name Rainier in the State of Washington and the territory of Alaska at March 1, 1913, operating a brewery and beer business, could reasonably expect the 12½ per cent return on that name?

A. Yes, there isn't any question but that they could expect that return.

Q. So then you have taken into consideration the [387] position of a willing buyer?

A. Yes, sir.

Q. Now, just what do you mean by "fair market value"?

A. What a willing buyer would pay a willing seller.

Q. And both familiar with the facts?

A. Certainly.

Q. Well, now, you have testified, Mr. Forbes, that from the earnings—that you are familiar with the financial records of the company from 1908 to 1913, and also with its income accounts, and now

(Testimony of John F. Forbes.)

based upon those and upon your experience, what, in your opinion, was the fair market value as of March 1, 1913, of the name Rainier?

Mr. Neblett: If your Honor please, the question is objected to on the grounds, first, that it has not been shown what property Mr. Forbes is valuing and under what conditions the property is being valued.

I want to call your attention to the fact, your Honor, that the contract of April 23, 1935, in addition to the sale of the right to Seattle Brewing to manufacture this beer in the State of Washington and Territory of Alaska under the name Rainier, that contract, your Honor, contained the provisions, that is to say, "other rights in addition to the right to the trade name Rainier in the State of Washington and the Territory of Alaska."

Those rights were such as Century's obligation to [388] buy the malt from Rainier. Another one, elimination of competition by Rainier. Three, obligation on Century's part to expend for advertising. Four, obligation on Century's part to purchase the plant of Rainier for $250,000.

Obviously, your Honor, the very premise on which Mr. Forbes has based his value falls flat on its face because he has not taken into consideration what this obligation to buy malt from Rainier was worth, what the elimination of competition by Rainier was worth, what the obligation of Century to expend for advertising was worth, and what the Seattle got by virtue of the tangible assets that they paid $250,000 for was.

(Testimony of John F. Forbes.)

His value is false for another reason, a fatal reason.

Each one of those, under the terms of this contract, of these provisions that I have just mentioned, except the obligation to buy malt, is still in existence under that contract, your Honor, and to this very day Rainier must perform, or Seattle must perform under this contract.

Now, that being the case, your Honor, Mr. Forbes has not been given a question: What was the value of the good will inherent in the trade name Rainier under this contract which Mr. Forbes spoke about of April 23, 1935, together with these other rights, in addition to the right to use the trade name that I have just mentioned. [389]

If your Honor please, under our theory of the case, from this Petitioner's standpoint, this was a lease. Mr. Forbes' value assumes that a sale occurred. His value, therefore, your Honor, is subject to that fatal defect, and, therefore, is of no probative force or value in this case.

Mr. Mackay: If your Honor please——

The Court: (Interposing) Well, I will take your arguments under consideration at the proper time. I will overrule your objection to the witness expressing his opinion. I think the witness has made it clear what factors he took into consideration in arriving at his opinion and, of course, what weight can be given to the opinion depends upon the entire record that is being made here, the arguments to be made in your briefs, and so forth.

(Testimony of John F. Forbes.)

You may answer the question.

The Witness: What was the question?

By Mr. Mackay:

Q. I merely asked you what your opinion was as to the fair market value on March 1, 1935, as to the name Rainier?

A. In round figures, $1,150,000.

Q. Now, that is the value, is it, Mr. Forbes, localized in the State of Washington and the Territory of Alaska? A. Yes.

Mr. Mackay: Take the witness. [390]

Cross Examination

By Mr. Neblett:

Q. Mr. Forbes, to get it very specific, I want you to tell the Court what property you valued as of March 1, 1913, and under what conditions you valued it?

A. The property was taken at the book value as disclosed by the books and accounts.

Q. I believe you spoke about, and answered a question propounded to you by Mr. Mackay, that you valued it under the contract of April 23, 1935?

A. What?

Mr. Neblett: Read the question.

(The question referred to was read by the Reporter.)

The Witness: No.

(Testimony of John F. Forbes.)

By Mr. Neblett:

Q. You don't recall making a statement like that?

A. I didn't make any statement like that.

Q. Well, the record will show.

Now, Mr. Forbes, under what conditions did you get your March 1, 1913, value of the good will inherent in the trade name Rainier?

A. What do you mean by "conditions"?

Q. I mean what strings did you attach to it?

A. You must be more specific with your questions. I [391] can't answer that kind of a question.

Q. I am just asking you then—put it this way, then, Mr. Forbes:—— A. Yes.

Q. I want to be as specific and as fair with you as I can. A. Well, I——

Q. (Interposing) You are familiar with it. You spoke several times about the contract.

A. Yes, sir.

Q. Of April 23, 1935. A. That is right.

Q. You apparently have read that contract?

A. Oh, I have read it, yes.

Q. And you spoke about the fact that this name was worth a million dollars because it actually sold for that under that contract?

A. That is right.

Q. Is that not right? A. That is right.

Q. Now, did not that contract contain an obligation by Century to buy malt from Rainier?

A. It may have, but there was not anything in that contract that would interfere with that value

(Testimony of John F. Forbes.)

as to that good will, as I read the contract. Anything else must be an [392] opinion.

Q. All right.

A. Now, as I read that contract, there was not a single thing in there that would affect the fact that, as I saw it, they paid a million dollars for that good will, that the contract, as I read it, covered five years, that these people paid for the use of the name Rainier a royalty of 75 cents a barrel up to 125,000 barrels, and beyond that they paid an increased figure. They carried that on for five years, and at the end of five years they had the option of buying the thing for a million dollars.

Now, that is exactly what they did. It is a very long contract, but that is my understanding of the contract.

Q. And if your understanding of the contract is wrong, your value would necessarily be wrong, is that right?

A. Well, "my value"? What do you mean?

Q. I mean your value of one million?

A. No. They have no relation.

Q. I am going to read you from this contract now in a second, Mr. Forbes. That contract contained a provision for the elimination of competition by Rainier in the State of Washington, did it not? A. I don't remember.

Q. You don't recall that?

A. I don't remember; no. [393]

Q. Well, wouldn't, as a practical matter, Mr. Forbes, to the buyer, Seattle—when they put up

(Testimony of John F. Forbes.)

$1,000,000 wouldn't they want to know whether Rainier would stay out of competition in the State of Washington?

A. If they bought an exclusive right to the use of the name Rainier forever, naturally that would be implied. Certainly, it would be implied.

Q. That would be an important consideration?

A. Well, heaven's sake, if they bought the name that is all there is to it. I don't see anything in your question.

Q. Well, I am going to read from the contract, paragraph 9.

> "Rainier agrees that during the period of time this agreement remains in force it will not manufacture, sell or distribute within the territory herein described directly or through or by any subsidiary company or instrumentality wholly-owned or substantially controlled by it, beer, ale, or other alcoholic malt beverages, or directly or indirectly enter into competition with Century in said territory."

A. Well, isn't that a natural thing? If Century was buying the good will, why, certainly they would want that provision included. That is part of the good will. That is what they were buying. [394]

Q. Now, Mr. Forbes, this potential buyer in Seattle who was to pay, under your opinion, this million——

A. (Interposing) $1,150,000.

(Testimony of John F. Forbes.)

Q. Yes, $1,150,000 for this name, unless he could get an agreement from Seattle Brewing & Malting to stay out of competition, what, in your opinion, would the value of the name Rainier be?

A. I don't know that I have any opinion on that, and I don't know that if I did it would have any value.

Q. I am asking you now to take the situation in Seattle that this potential buyer couldn't get an agreement from Seattle Brewing & Malting to stay out of competition. What would you advise a prospective buyer to pay for that name?

A. Well, he wouldn't be buying anything if they wouldn't stay out of business, would he?

Q. I am asking the question. You answer.

A. Well, I am asking you to see that I understand the question.

Q. You understood my question.

A. If I did understand the question, the answer is "No."

Q. In other words, the name is not worth anything at all unless the seller agrees not to compete; is that right?

A. I would assume that would be right, yes. No question about that. [395]

Q. And that is your answer?

A. Yes, exactly. They bought the exclusive right. They bought the name. They bought it forever. No question about that.

The Court: Under the 1940 contract they did.

Mr. Mackay, in his hypothetical question, wouldn't state those elements to you.

(Testimony of John F. Forbes.)

The Witness: Yes. Well, as a matter of fact, that is what they did under the 1940 contract.

The Court: You are asked to express an opinion forgetting all about the 1940 contract, as I understand it.

The Witness: Well——

The Court: (Interposing) Go on, Mr. Neblett.

Mr. Neblett: Very true, your Honor, but I am testing his value there to show him that he more or less based and fortified and confirmed his value by reference to——

The Court: Well, if you were asked to value the good will inherent in the name Rainier on March 1, 1913, between a willing buyer and a willing seller, both having in mind all the facts——

The Witness: (Interposing) Yes, I would fix this value.

The Court: And you were advised to forget you ever saw the contract executed in 1935, and you were told [396] that you should absolutely exclude from your mind any consideration of the 1935 contract, would you have to give further consideration to your figure of $1,150,000?

The Witnes: No, your Honor, I would not. There isn't anything in what you have said that would modify those figures. They are made absolutely without reference to the 1940 contract, but the fact of the matter is that the 1940 contract exists, and I know it, so there it is. But this value is made without reference to it, and it earned $180,000 a year.

(Testimony of John F. Forbes.)

By Mr. Neblett:

Q. In your testimony in chief, on direct examination, Mr. Forbes, what was your purpose then, if this million dollar transaction didn't influence you, for your several references to it?

A. Simply to illustrate people did buy a good will under those particular conditions, that is all.

Q. All right, under those particular conditions, exactly. A. Yes.

Q. Now, if Century had not bought the $250,000 brewery plant under the contract of April 23, 1935, do you think they would have bought the trade name Rainier and paid a million dollars for it?

A. I am sure I couldn't pretend to tell you what I think they would have done under a given set of circumstances. [397] That is entirely out of my understanding.

Q. Do you think Seattle would have paid a million dollars for this trade name Rainier without the obligation on Century's part to expend certain amounts for advertising?

A. Well, I am sure I couldn't say that, but the fact does remain that they paid from seventy-five to ninety-eight thousand dollars a year royalty on the thing, and in order to avoid paying the royalty, why, they took advantage of the offer to buy it outright.

Q. Is it not a fact that as a practical matter, Mr. Forbes, that Mr. Sick of Seattle Brewing & Malting Company would not have wanted this trade name for any possible amount, anywhere near a

(Testimony of John F. Forbes.)

million dollars unless he could have got the other substantial considerations in that contract we have talked about?

A. I haven't any idea what was in his mind, no. I have just met the gentleman. I have no idea what his mental processes are. I don't know what he thinks, or anything about it.

Q. And you couldn't give us any answer at all on that? A. No.

Q. Well, don't you think those other considerations and rights in this contract of April 23, 1935, had some bearing on the $1,000,000 paid by Century?

A. I am sure I don't know. [398]

Q. Well, now, as an expert and as apparently——

A. (Interposing) An expert is not a mind reader.

Q. But as an expert, and as apparently a successful businessman, wouldn't you say that those other conditions in that contract had some bearing on the amounts agreed to be paid, namely, the million dollars?

A. To be perfectly frank with you, I don't remember what the details of that are. I simply can't tell. I don't remember that they were important in the thing at all. As I remember reading the contract, which was quite a while ago, they, themselves, were utterly unimportant so far as the main issue was concerned, the sale of the good will.

Q. Then, Mr. Forbes, you left yourself open to attack here when you used in your testimony a

(Testimony of John F. Forbes.)

comparison for your value, namely, the sale of a million dollars without knowing the conditions under which that million dollars was paid?

A. Oh, no, I wouldn't say that. I know generally. There may be some small provisions in that contract that might modify the amount a little bit one way or the other. I am not sure that there are. But generally they paid a million dollars for that good will, there isn't any question about that. And speaking as one of the accountants for the company, why, we have been trying to save the taxes on it, but we think that we have sold a capital asset for a million dollars, and all our contemplation is on the theory that we have done [399] that.

The Court: We will recess for a few minutes.

Mr. Neblett: Yes, your Honor.

The Court: But just before we recess, there is something you have just said. You said you are——

Read what the witness just said.

(The answer referred to was read by the Reporter.)

The Court: And so you are at the present an accountant, or associated with the accountants for the Rainier Brewing Company?

The Witness: Yes, I said that in my opening testimony.

The Court: I see. Well, I wanted to be sure about that.

The Witness: Yes, that is correct.

(Testimony of John F. Forbes.)

The Court: You are associated with them at the present time?

The Witness: Yes. And I explained that I was also on the Board of Directors of the company.

The Court: Are you at the present time?

The Witness: Yes. I explained that fully.

The Court: That is, the Rainier Brewing Company is the California—is now the California business?

The Witness: Yes. I am what is ordinarily called [400] a technical director.

The Court: I thought that you said that you had retired from business. That is what puzzled me.

The Witness: Oh, I retired—I told about half the story—I retired from business in 1941, and after a period of some three or four years I nearly went crazy and started in another firm.

The Court: What is the name of your present business, then?

The Witness: The present business is John F. Forbes & Company, which is what I testified.

The Court: And you are an accountant then for the Petitioner in this proceeding?

The Witness: Our firm is, yes.

The Court: We will take a recess, please.

(Short recess.)

The Court: Go ahead, Mr. Neblett.

Mr. Neblett: May we proceed, your Honor?

The Court: Yes.

(Testimony of John F. Forbes.)

By Mr. Neblett:

Q. Mr. Forbes, what value would you put on the exclusive right to use the name Rainier beer if Seattle Brewing were to continue in business and place on the market a new brand of beer through their customers, sales organization, and same location, and through their controlled saloons in [401] the State of Washington?

The Witness: Would you repeat that question?

The Court: Would you read the question, please?

(The question referred to was read by the Reporter.)

A. The same value.

By Mr. Neblett:

Q. It wouldn't influence your——

A. (Interposing) No, no. There were plenty of other brands of beer being made up in Seattle, up in Washington.

Q. Then, Mr. Forbes, Seattle Brewing & Malting Company, under your valuation, would retain its old list of customers, its sales organization, and its control over captive saloons, is that right?

A. That is right.

Q. And this prospective buyer that you speak about, where would he get his capital from to pay this $1,150,000 to buy that name without any tangible assets?

A. Well, that is kind of a personal question. I wouldn't know where he got his capital.

(Testimony of John F. Forbes.)

Q. Well, now, where would he find it, do you think? You claim you are familiar with the conditions up there in 1913. Do you think he would find such capital in Seattle, in the State of Washington at the time? [402]

A. Well, let's assume he had it.

Q. You mean the prospective buyer?

A. Yes. Why not?

Q. All right. In other words, your prospective buyer would have to have capital enough to go in business?

A. Well, if he wanted to go into business, but, as someone suggested, someone might want to buy the name to put it out of business, that is, the value of the name.

Q. That is, just the value of the name?

A. Yes, yes, that is right.

Q. Now, Mr. Forbes, the Court made the point pretty clear, and I don't want to go over it any further, but your valuation then is based on the point of view of this seller, and you have computed your——

A. (Interposing) The point of view of——

Q. (Interposing) Just a minute. Let me get through.

And you have computed your valuation based on the Seattle Brewing & Malting Company's goodwill, based on its sales organization, its old customers, its site, and all those things that go to make up the going concern value of a business, is that right?

A. That is right.

(Testimony of John F. Forbes.)

Q. Very well. Now, after Rainier had sold this——

A. (Interposing) Let me modify that answer. That is, after giving consideration to all the elements that you have [403] mentioned, why, the figure which I have named would be the goodwill value.

Q. I might ask this question before I ask the question I had in mind, Mr. Forbes: Did you or did you not disregard the imminence of prohibition in the State of Washington when you formed your value? A. No, I didn't disregard it.

Q. Well, what value did you give to that factor?

A. No value at all.

Q. Now, Mr. Forbes——

A. (Interposing) That was really after the result of very serious consideration; no value at all.

Q. Now, Mr. Forbes, after Rainier had sold under this contract the name "Rainier" and other rights for $1,000,000, in your opinion, how much goodwill did Rainier have left?

A. Well, that would involve my computing the value of the goodwill of Rainier, which I never have done.

Q. Well——

A. (Interposing) I haven't any idea what that would be.

Q. Can you give me an answer on that one?

A. No, I cannot; no. That would be a very involved and lengthy computation.

(Testimony of John F. Forbes.)

Q. What States is Rainier Brewing Company operating in at the present time? [404]

A. What?

Q. What States?

A. Well, specifically, I can't tell you. I have the information that I can get for you in two minutes.

Q. You wouldn't have any idea?

A. No, not to give you definitely the States.

Q. Incidentally, do you know whether Rainier Brewing Company has ever sold its name to any other company to do business in some other States?

A. I have no recollection of its having done so. I would say "No," but I am not sure.

Q. In other words, this transaction here is the only one of its kind that you know about?

A. So far as I know, yes, I think it is.

Q. Now, to go to the other end of this thing——

Incidentally, if your Honor please, it is very hard for me to figure out which side I am on. I tried the other side of this case up north. I am trying to be neutral.

The Witness: Well, if I might say so, I would be very unhappy if I thought you were on the other side.

Mr. Neblett: With respect to these beer companies I try to be neutral. I do think I prefer some other beer, though, sometimes to Rainier.

Mr. Mackay: Are you an expert on beer?

The Witness: Well, Mr. Goldie, he is the president [405] of it.

(Testimony of John F. Forbes.)

By Mr. Neblett:

Q. Now, Mr. Forbes, seriously how much goodwill did the Seattle Brewing & Malting Company have left as of March 1, 1913, when it had disposed of its right to the name Rainier in the State of Washington and Territory of Alaska?

Mr. Mackay: Pardon me. May that question be read?

(The question referred to was read by the Reporter.)

Mr. Mackay: Now, if your Honor please, there is no evidence here at all to dispose of it in 1913. The evidence is to dispose of it in 1940. I think the question is immaterial.

Mr. Neblett: If your Honor please, we are dealing here with the hypothetical value as of March 1, 1913, after Seattle Brewing & Malting Company disposed of the name Rainier. Now, certainly Seattle Brewing & Malting Company as of March, 1913, had something left. It had Seattle Brewing & Malting Company's trade name, it had Seattle Brewing & Malting Company customers, it had Seattle Brewing & Malting Company's plant and location, it had Seattle Brewing & Malting Company's goodwill organization.

I want to know from this witness, this expert, what was the value of the goodwill retained by Seattle [406] Brewing & Malting Company after the transfer to this prospective buyer of the trade name Rainier as of March 1, 1913.

(Testimony of John F. Forbes.)

The Witness: I will have to ask you a question. When did they sell it?

The Court: No. This is following through now on this hypothetical transaction between a willing buyer and a willing seller.

The Witness: Oh. Well, would you read that? I didn't understand that it was a hypothetical question.

The Court: Well, assuming that the trade name Rainier had been sold to a willing buyer in 1913, what would the Seattle Brewing & Malting Company have left?

The Witness: What goodwill would they have left?

By Mr. Neblett:

Q. Yes. A. None so far as I know.

Q. No goodwill at all? A. No.

Q. In your opinion? A. That is right.

Q. And your value, then, of $1,150,000 based as the March 1, 1913 value of that trade name, would rob Seattle Brewing & Malting Company of all its goodwill, and Seattle Brewing & Malting Company would have no goodwill left, is that your statement?

A. That is as I see it, just as it did the same thing with Rainier.

Q. Very well.

Mr. Forbes, you testified that one of the evidences in arriving at the value of the goodwill was to determine the value of the tangible assets as shown on Exhibit 24.

(Testimony of John F. Forbes.)

Just to show you what Exhibit 24 is, I hand it to you.

A. Yes, sir.

Q. And ask you to look at it.

A. I am familiar with it.

Q. You are familiar with it? A. Yes, sir.

Q. Now, Mr. Forbes, it is observed that excluded from the tangibles is an item of investments ranging from $367,136.54 in 1907 to $791,182.67 in 1912.

A. That is right.

Q. Now, Exhibit 13 I hand you at this time and I shall ask you the following question: Exhibit 13 contains a balance sheet for the years 1907 to 1912, which contains a sub-classification of investments, which agrees with the investment figures on Exhibit 24. A. Yes, sir.

Q. Which includes bills receivable ranging in amount from $292,206.10 in 1908 to $598,353.75 in 1912. [408] A. Yes, sir.

Q. Now, what were these bills receivable?

A. I don't—frankly, I don't remember what the details are. I can get those for you without any trouble.

Q. You don't know, then, whether they were amounts due from saloon keepers?

A. I don't remember.

Q. Would you get the detail on that for us, Mr. Forbes? A. Yes, yes.

Q. I would like to have it. You don't have it in the courtroom, you mean?

A. I don't think we have it in the courtroom, no.

(Testimony of John F. Forbes.)

Q. Well, why were they not included in the tangible assets used in the brewery business? Maybe, you can answer that.

A. Well, did we deduct them? (Examining document). Well, inasmuch as they were grouped as investments we didn't consider that they had anything to do with the matter of the manufacturer's sale of beer and deducted them normally because they didn't represent investments in the plant, tangible investments in the plant.

Q. Assuming they had been advances to saloon keepers, how would you have handled it?

A. We would have omitted it just as we have omitted it. [409]

Q. You mean you would have treated it in the same fashion?

A. That is right. We wouldn't consider it a tangible asset.

Q. You would not have regarded it as an asset used in the brewing business, would you, Mr. Forbes?

A. No, we didn't consider it a tangible asset, nothing upon which to base earning power.

Q. And I believe you said you would get us a detail on that item before——

A. (Interposing) If it is available we will get it for you.

Q. Yes. Now, Mr. Forbes, just one little point here that doesn't amount to much, probably.

A. As you realize, we have had some difficulty in getting some details of this thing.

(Testimony of John F. Forbes.)

Q. Yes. I show you a letter here on your stationery headed "John F. Forbes & Company, Certified Public Accountants", and it has a protest attached to it which apparently your firm prepared.

A. (Examining document) Yes.

Q. I show to you or read to you this statement contained in the protest. The protest is dated October 15, 1942. A. Yes, sir. [410]

Q. "In Washington beer was distributed through a licensing system under which the brewer would set up a saloon, or acquire the license of a saloon, and a captive saloon would then dispense only the beer of the license-holding brewery."

A. Yes.

Q. Are you familiar with that practice in the brewery business? A. More or less, yes.

Q. And is that the usual practice in this country?

A. Well, it used to be. Right at the present time I am not familiar enough with the practices of various breweries, but when I used to go into details, and was familiar with the details, why, it was a normal practice, yes.

Q. Well, I believe our information shows that Seattle Brewing & Malting Company licensed twenty such saloons in Washington prior to 1913.

Do you know what those figures are?

A. No, no, but I would consider that part of their plan of selling.

Q. I stand corrected on that. I have just been

(Testimony of John F. Forbes.)

corrected to this extent, Mr. Forbes, that they owned twenty and licensed considerably more.

Now, would you get us, have some of your associates get us the exact detail? [411]

A. If it exists we will get it for you, yes.

Q. I think it exists because we already have some of it? A. Have you?

Q. Get us exact detail with respect to the saloons owned by Seattle Brewing & Malting Company during the period and the ones they licensed.

A. Yes, sir.

Q. If you would ask Mr. Sonnenberg (he has been very nice getting us information) to furnish us those two things.

The Witness: Mr. Sonnenberg, make a note of that.

Mr. Sonnenberg: I can't supply the information of any licensed saloons, but I may be able—I will be able to give you a list of the purported saloons owned.

Mr. Neblett: That will be splendid, Mr. Sonnenberg.

By Mr. Neblett:

Q. Mr. Forbes, the record would show, of course, but I am still of the opinion that you used the 1940 transaction as a comparison.

Now, I want to ask you if there was not an entirely different situation existing as of March 1, 1913, and as of 1920 in the brewery business generally?

The Court: Was there or was there not?

(Testimony of John F. Forbes.)

A. Well, frankly, I don't know what you mean. What do you mean by a "difference"? [412]

By Mr. Neblett:

Q. I mean——

The Witness: (Interposing) Do you know what he means?

The Court: Well, he is asking you if there was a difference, if the conditions were different in 1913 in the brewery business than they were in 1940 in the brewery business.

A. Frankly, I don't know what you mean. They made beer in approximately the same way and carried on the businesses in approximately the same way; approximately the same way. Their methods of selling may have been a little bit different. Sales ideas may have been a little bit different.

The Court: Do you mean in the State of Washington?

Mr. Neblett: Yes, State of Washington and generally.

The Witness: Yes, generally. I am talking about generally.

By Mr. Neblett:

Q. Was there any threat of prohibition in 1940, Mr. Forbes? A. Any threat of prohibition?

Q. Yes.

A. Well, if you have been reading some of the tracts of the temperance people that are sent to me you would think [413] there were. They seemed to think——

(Testimony of John F. Forbes.)

The Court: (Interposing) Oh, seriously speaking now?

The Witness: Yes, this is seriously speaking, because all the information that we get would be from reading. Seriously speaking, why, there is——

The Court: (Interposing) Then that is news to me. I would not have thought that in 1940—let's see. This is 1945. 1940 was one year before the War. We were at war in Germany. I hadn't read anything that I can recall in 1940 that would suggest that there was any threat of national prohibition in the United States in 1940, so I would like you to explain your answer.

The Witness: Why, a good many of the pamphlets which were sent to me and have been sent to me over the last five years and more have given the plans of the drives to effect a revival of prohibition.

The Court: Well, he didn't say—the question was not whether any group in the country was still advocating prohibition in 1940. His question was whether there was any threat.

Maybe you had better reframe your question. It is the word "threat" that is important in the question.

Mr. Neblett: All right, I will, if I can prefix my question with a little statement. [414]

By Mr. Neblett:

Q. Mr. Forbes, this question is directed to your knowledge as an expert, and also I am going to direct this question to your basic attitude as an

(Testimony of John F. Forbes.)

expert witness just to see whether or not you apply the reasonable factors of common sense to a situation.

Now, Mr. Forbes, standing on the ground as of March 1, 1913, was there not a suggestion, you might say, of the possibility of prohibition becoming statewide in the State of Washington?

A. A possibility, yes; but probability, no.

Q. But there was a suggestion of a possibility?

A. There was a suggestion of a possibility, of course, because they were having these local option fights all the time, but the peculiar feature about it is that as the local options would go into effect the earnings of this company would go up.

Q. Were not the earnings of this company less favorable for the fiscal year commencing June 30, 1913, than they were for the fiscal year commencing——

A. (Interposing): Yes, but in 1914 they were almost twice as much as they were in '13, you see.

The Court: What was almost twice as much?

The Witness: The earnings. Your previous witness tried to bring out the fact that there was now an incline [415] by simply calling attention to the one year.

The earnings for 1912 were four hundred forty-seven thousand-odd; for '13, $436,000, they went down that year, but for 1914, for the year ended June 30, 1914, the election being in November of that year, the earnings were $659,965, and in 1915,

(Testimony of John F. Forbes.)

for the year ended June 30, 1915, which was after the election, they were $556,000.

The Court: Well, are these the earnings for the whole company or in the State of Washington? What are those figures that you are reading?

The Witness: Well, these are for the whole company.

The Court: For the whole company?

The Witness: For the whole company.

The Court: Yes, because the sales might have gone down in the State of Washington and come up in the State of California, might not they? I should think so.

The Witness: Well, it is possible, but frankly that is not my understanding of these figures.

The Court: Well, I mean we have to be certain about that.

The Witness: Yes. Well, that is all right. I can find that out.

But you are speaking about the decline would be comparable to the other—— [416]

The Court (Interposing): No; we are talking about sales in Washington, as I understand it.

Mr. Neblett: That is right, your Honor.

By Mr. Neblett:

Q. Now, Mr. Forbes, is it not a fact that the brewery peoples realized that prohibition would be on them in a couple of years or more, and they were doing their best to get in and make a great sales effort to sell all the beer they could before they wouldn't get any more?

(Testimony of John F. Forbes.)

A. Well, I wouldn't say that it was because they wouldn't get any more. It is just a natural desire of a businessman to sell, and they sold, apparently.

Q. Isn't it the natural tendency of——

A. (Interposing): Of every businessman to sell.

Q. (Continuing): ——of some human beings, if they are totally prohibited, as some of these people thought they were going to be, to try to drink it up all at one time than try to make it last?

A. No, I don't think so.

Q. Now, Mr. Forbes, let me ask you this: Standing on the ground as of March 1, 1913, was there not a suggestion, and would not you believe as a reasonable man and an honest man that there was a pretty good chance that prohibition would come along in the State of Washington in a very short period of time? [417]

A. No, I wouldn't have thought so.

Q. You wouldn't have thought so?

A. No, I wouldn't have thought so. As a matter of fact, I spent a lot of time up there at that time. Frankly, I wouldn't have thought so.

Q. All right. I am just testing your basic attitude now. A. Yes, sir.

Q. Sift the facts through your mind.

Now, Mr. Forbes, how do you explain, then, if that was the situation, as you viewed it then, and as you evaluated it, that on November 3, 1914, Washington became dry?

A. How do I explain it?

(Testimony of John F. Forbes.)

Q. Yes.

A. Well, I explain it by the reason, the fact that the dry organizations put on a terrific drive, put on a terrible fight. There was an extraordinary fight. You have put on record here the list of publications which our people dug out and went into. Well, in examining these publications, almost up to the time of the election, why, I wouldn't assume that the election was going to win, and, of course, they only won by about 5 per cent. But the fight seemed to be carried on with a great deal of vigor on both sides, and up to the very last minute everybody thought that the wets had won. It really was not a—— [418]

Q. (Interposing): But it was a very hot contest, wasn't it?

A. Yes, of course, it was a hot contest.

Q. Was it in the papers? A. Yes, sir.

Q. Didn't the various magazines carry items about it?

A. Frankly, I didn't see the magazines. I didn't read the magazines.

Q. Would not a willing buyer up there, or buyer coming in there have been advised of these factors?

A. This was all away after March 1, 1913.

Q. I am talking about March 1, 1913.

A. Well, I am not; I am talking about the election that took place in November. March 1, 1913, there was not anything that would worry the brewery people at all, as I view it.

Q. Did you know that 87 per cent of the State was licensed territory as of March 1, 1913?

A. I don't think there is any significance in that because, as I told you, as the State became more subject to local option, or to the dry effect of local option, the earnings of the company went up within Washington.

Q. And you disregard all these factors?

A. No, no, no, I don't disregard them; but, as I state, they have no significance. [419]

Q. Very well. That is just about the same as disregarding them.

A. No, it is not the same, not at all.

Q. Now, Mr. Forbes, we have talked about March 1.

Now, standing on the ground in 1940, and as a reasonable man, would you say there was a suggestion that we were going to have prohibition pretty soon?

The Court: Where?

Mr. Neblett: In the State of Washington.

A. Well, to tell you the honest truth, I don't know what the feeling is in the State of Washington right now. I had the idea that the State ran the saloons, and sold the liquor, and that since the State did sell the liquor, why, there probably wouldn't be any dry movements, but, frankly, I don't know. I haven't been up there for quite a while.

By Mr. Neblett:

Q. Now, Mr. Forbes, don't let's fence here on immaterial matters.

(Testimony of John F. Forbes.)

In your opinion, how long do you think it would be before we have prohibition again?

A. My judgment in that won't be worth a whoop. I simply don't know. I would have no more idea than the man in the moon. As a matter of fact, when we went dry, when the nation went dry it was the greatest surprise to me in the world. [420]

Q. Do you remember? Now, I am warning you, I am testing your basic attitude.

A. You are not testing anything. You are asking me some questions.

Q. Those questions test your basic attitude.

The Court: Counsel is testing you, that is exactly what he is doing. Under the rules of our game he is testing your credibility. That is exactly what he is doing.

By Mr. Neblett:

Q. And if you make a nonsensical or ridiculous answer your credibility deteriorates.

A. Really, I am trying not to do it.

Q. I don't want you to do it, if it can be helped. I want you to stick to the facts and show us——

A. (Interposing): I am sticking to the facts. You don't have any question about that?

Q. All right.

Now, in your opinion, as a reasonable man, do you think we will have prohibition in the State of Washington in the next ten years?

A. Frankly, I simply cannot answer that question.

Q. Well, you have got an opinion on it?

(Testimony of John F. Forbes.)

A. I don't know. As a matter of fact, I haven't any opinion on it. I never thought about it, and I never give an opinion without thinking about it.

Q. Think it over right now. You are a resourceful man. [421]

A. That is absurd! I don't know a thing about what is transpiring in Seattle. My partner in Seattle has been raising a row with me about not going up there. He says, "There is so much doing, you ought to come up." Frankly, I haven't got time. I don't know what is transpiring.

Q. Mr. Forbes, you are not fair to my questions when you answer them in that way.

A. Certainly, I am! If I had any idea I would tell you.

Q. I want you to be fair to yourself.

A. I know, I understand that. You are the most solicitous gentleman I have seen for two or three days.

Q. It is sometimes right hard to make a witness tell what he knows, and I find I classify you in that category. I have to do it.

A. No, I will tell you what I know. But I won't tell you what I don't know.

Q. I didn't ask you what you knew. I asked you for your opinion as a reasonable man.

A. Well, you asked me whether I thought the State of Washington would go dry within the next ten years.

Q. Well, make it five.

(Testimony of John F. Forbes.)

A. Well, you can make it two, and I still wouldn't have any idea.

Q. No matter how smart you are in this world, Mr. Forbes, [422] if your basic attitude is sour you are not a good expert.

A. I know you are not talking about me when you are talking about smartness.

Mr. Neblett: I apologize for that statement, your Honor.

The Court: I think probably you have pursued this as far as you can profitably, if I may suggest you abandon the effort.

Mr. Neblett: Very well, your Honor.

Mr. Mackay: Yes.

The Witness: I trust his pursuit has been profitable up to this time.

Mr. Neblett: I believe that is all we want of this witness, your Honor.

Mr. Mackay: Mr. Forbes, I have one question to ask you.

Redirect Examination

By Mr. Mackay:

Q. I understood you to say on direct examination that you had determined a fair market value for the entire good will of the Seattle Brewing & Malting Company at March 1, 1913, of $1,440,000?

A. Yes, sir.

Q. And that you had attributed $290,000 of that to territory outside of Alaska and Washington?

A. Yes, approximately 20 per cent of it.

Q. And that you had assigned a value of $1,-

(Testimony of John F. Forbes.)

150,000 to the State of Washington and to the Territory of Alaska? A. That is true.

Q. Now, in view of that testimony, Mr. Forbes, how do you harmonize the answer that you gave to counsel when he asked you with respect to that assumed hypothetical buyer in 1916, or '13, I mean, if he had bought the entire good will at that time, what amount would the Seattle Brewing & Malting Company have left?

A. Well, of course, the entire good will in the State of Washington would be gone.

Q. Well, then, you misunderstood that question, did you? A. Well,——

Mr. Neblett (Interposing): He has not said so.

The Court: Well, the question, I think, referred to the Seattle Brewing & Malting Company, that is the company that had business outside of Washington, as well as inside of Washington.

The Witness: Well, of course, the question Mr. Mackay suggests to me, that the exception should have been made for the business that they had outside of the State, of course, so that what——

The Court (Interposing): You didn't think of that [424] at the time?

The Witness: No, I didn't think of that.

Mr. Mackay: That is all.

Mr. Neblett: That is all.

The Court: Will you step down?

The Witness: Are you through with me?

The Court: Yes, just step down.

(Witness excused.)

Mr. Mackay: I would like to call Mr. Humphrey.

WILLIAM F. HUMPHREY,

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your full name?

The Witness: William F. Humphrey.

Mr. Neblett: Your Honor, we don't care to retain Mr. Forbes any longer.

The Court: All right, Mr. Forbes, thank you for coming. You are excused.

By Mr. Mackay:

Q. Mr. Humphrey, will you please state where you reside?

A. I reside at the Olympic Country Club in San [425] Francisco.

Q. And you have lived here in San Francisco a few years, have you?

A. I have, all my life.

Q. I see. And what is your occupation?

A. I am President of the Tidewater Associated Oil Company, attorney-at-law also, not active.

Q. Go ahead.

A. I give my principal time to the Tidewater Associated Oil Company as President of that company.

Q. And are you also General Counsel for the Rainier Brewing Company?

(Testimony of William F. Humphrey.)

A. My office, former office, yes, sir.

Q. Yes. Now, Mr. Humphrey,—May I have Exhibit 1?

The Clerk: Yes (handing document).

Mr. Mackay: Thank you.

By Mr. Mackay:

Q. I call your attention to Exhibit 1, Mr. Humphrey, which is a photostat copy of an agreement made on the 23rd day of April, 1935, by and between Rainier Brewing Company and Century Brewing Association, and I will ask you if you participated in the negotiations leading up to the execution of that contract?

A. (Examining document): I did. [426]

Q. And will you please tell the Court where those negotiations were carried on?

A. They were carried on in Room 705, Suite 705 of the Standard Oil Building on Bush Street, in San Francisco.

Q. And they were carried on just immediately preceding the date of that contract, were they, Mr. Humphrey?

A. I believe an investigation I made recently shows it started the 23rd, I believe, of April.

Mr. Neblett: Could we have that date? He said it started the 23rd. Now, could we have the month, the date?

The Court: The 23rd of April, you mean?

The Witness: Monday, and I believe it was the 22nd of April, 1935.

Mr. Neblett: 1935. That is all I want.

(Testimony of William F. Humphrey.)

By Mr. Mackay:

Q. And do you recall, Mr. Humphrey, who attended those negotiations?

A. I can recall generally. The first day of negotiations there were present Mr. Goldie, Mr. Hemrich, Mr. Allen, I believe a Mr. Kerr—I am not sure—Mr. Chadwick and Mr. Mackie.

Q. Yes, not myself?

A. No, you were not there. Mr. Mackie, I believe, is the Secretary of the Seattle Brewing & Malting Company. [427]

Q. Which was then known as the Century?

A. Which was then known as the Century.

Q. Yes. Now, Mr. Humphrey, prior to those negotiations had an offer been made to any officer or officers of the Rainier Brewing Company by the Century?

A. I believe a letter, which I have seen——

Q. (Interposing): I call your attention to a letter dated April 11, 1935, and ask you if that refreshes your memory?

A. (Examining document): Yes, this is the copy of a letter which was received by Mr. Hemrich from Mr. Sick.

Q. Now, was—Pardon me. Go ahead.

A. Some time after the date it bears. I returned from New York, I believe, on the 11th, the 10th or 11th, so it was some time after that that it was called to my attention.

Q. And Mr. Hemrich, at that time was he President of the Rainier Brewing Company?

(Testimony of William F. Humphrey.)

A. He was President of the Rainier Brewing Company, yes, sir.

Q. And is Mr. Hemrich alive now?

A. No, he is dead.

Q. And he has been dead for three or four years, has he?

A. To my memory, I would say three or four years, yes.

Q. Yes. Have you had a search made for the original of [428] this letter, Mr. Humphrey?

A. I caused a search, yes, to be made, but I didn't make it myself personally, but the office made a search for it.

Mr. Neblett: We have no objection to the letter being a copy, if that is what you are trying to get in.

Mr. Mackay: If your Honor please, I would like to offer this in evidence. Would you like to see the original copy? I gave you a copy. Would you like to see the original, the original copy, I mean?

Mr. Neblett: Yes. I just hadn't had a chance to run through it.

Mr. Mackay: If your Honor please, I should like to offer this in evidence.

Mr. Neblett: No objection, your Honor.

The Court: Received as Exhibit 32.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 32.)

[Petitioner's Exhibit No. 32 appears in Book of Exhibits.]

(Testimony of William F. Humphrey.)

Mr. Mackay: I am reading from a copy, your Honor. I should like to read it.

> "I advised you verbally this afternoon that in the light of the objections taken to the deal as we made it in San Francisco, some of my associates were not keen to go through on that basis. I suggested an alternative way of dealing with the problem and I [429] am complying with your request that I submit it by letter so that you and your associates may consider the matter.
>
> "I think our company would be willing to make the Rainier Brewing Company this proposition: We would buy the brewery plant at Georgetown for $200,000 cash provided that your company also permit us to manufacture and sell your Rainier and Tacoma brands of beer in the State of Washington and in Alaska for all time, and to have the name 'Seattle Brewing & Malting Company.' For this privilege we would pay your company a minimum consideration of $50,000 a year, and we would be prepared to pay on a graduated basis according to barrelage whereby if we succeeded in selling say 100,000 barrels of your brands in a year——"

I will not read all of it in evidence, but I would like to read the last sentence.

> "I will be glad to hear after you discuss this with your associates whether you are interested."

(Testimony of William F. Humphrey.)

By Mr. Mackay:

Q. I will ask you, Mr. Humphrey, if you advised them, the Century people, that you were interested in this proposal of theirs?

A. I did not personally, but—— [430]

Q. (Interposing): But you knew they had been advised?

A. There was a meeting of some of the officers, of the directors. They authorized Mr. Hemrich to notify them by telegram.

Q. Yes. And as a result of your notifying them of your interest they came down and these negotiations were carried on, is that right?

A. Yes, sir. They came down after Mr. Hemrich had telegraphed, and I believe they sent a telegram in response that they would be down a certain date.

Q. Yes. Now, Mr. Humphrey, prior to this conference of the 22nd of April, 1935, and to which you referred as the date you carried on negotiations, had Century ever offered to buy Rainier or any of its assets?

A. I have no recollection of any offer being made.

Mr. Mackay: You may take the witness.

Cross-Examination

By Mr. Neblett:

Q. Mr. Humphrey, I believe you stated the first conference was held on April 22, 1935?

(Testimony of William F. Humphrey.)

A. Well, I am trusting that to memory. I think that is the date.

Q. That is not very material, but we will just have a date there. [431]

Now, who attended these conferences, to the best of your recollection?

A. Well, the conferences, as I recall, extended over two or three days, and the first day the parties I mentioned, Mr. Goldie, Mr. Hemrich, Mr. Allen of the Century Brewing Company, Mr. Kerr of the Century Brewing Company, and, I believe, Mr. Chadwick, and also Mr. Mackie.

Q. Yes.

A. Those were the people that attended the first day, and I believe the conference continued into the night and the next day too.

Q. Then these conferences, as you recollect it, were adjourned from time to time for a few days?

A. No, they were not adjourned. I believe that even on the same date, of the first day, they met again until sometime late in the evening. I was not present at that meeting. After we had discussed the terms of the agreement they were then adjourned that night to have the agreement drawn by my associate, Mr. MacMillan.

Q. Well, you were not present, you say, at this conference. Do you know whether or not the agreement was modified in your absence by any of your associates?

A. The agreement was discussed. They prepared the draft of an agreement, and the next day I was present when they discussed it again, and then there

(Testimony of William F. Humphrey.)

were certain [432] discussions about the different terms, and some terms were changed.

Q. Then, Mr. Humphrey, whatever agreements were finally settled upon you would be familiar with what was said and done, do you think?

A. Yes, I would think so. I was there. I left again for New York on the 25th, and I believe the agreement was signed as far as the Rainier Brewing was concerned before I left.

Q. And now do you recall, then, whether or not Mr. Allen made a statement at this conference somewhat of this character: "They did not agree to sell, and did not agree to sell the business."

Did you hear any, or have any understanding at any of these conferences like that?

A. I have no recollection of that occurring at any of the conferences I referred to. I don't think there was any question at that time of selling the business as a whole. They wanted the royalty, and then while they discussed the question of the royalty later on it was suggested that then they would want to, after five years have the right or some period of time, the right to acquire perpetual royalties.

Q. Do you remember a statement of this character made by, presumably made by Mr. Allen:—I believe you were supposed to ask this question. [433]

A. That I was supposed to have asked it?

Q. Yes. "Are you folks here to try to buy us again?"

The answer was: "No. We are here to make a royalty deal.

(Testimony of William F. Humphrey.)

"Is your attitude one where we could buy?

"No, we refuse to sell. We won't sell piecemeal. We will sell you the whole brewery."

Do you remember any conversation like that?

A. No, I don't see how that could take place in view of the letter, because they stated in the letter they came down for a royalty, and I wouldn't ask them if they came down to buy again.

Q. And what is your understanding of what the contract meant at the time, Mr. Humphrey, this contract of April 23, 1935, as to whether it was a license or a sale?

A. Well, my understanding is that for the first five-year term they wanted a royalty, they wanted to pay a royalty, and they agreed to pay a certain amount per barrel, I think it was 75 cents up to a certain limit, and something more than 75 cents a barrel, in excess of, I think, 125,000 barrels. I am just drawing on my memory, of course.

Q. Yes, I understand.

A. And that someone said when they negotiated that they liked the point of acquiring—I can't give the exact words, it is so long ago—but acquiring a perpetual right after [434] this trial period if they desired an option for it, or privileges.

Q. I read you from a transcript in the Seattle case, Docket No. 6625, and from the testimony of Mr. George W. Allen, which testimony presumably occurred in your presence.

A. You don't mean the whole——

(Testimony of William F. Humphrey.)

Mr. Mackay: If Your Honor please, I object.

The Witness: You don't mean the whole testimony occurred in my presence because I was not at the trial.

By Mr. Neblett:

Q. I am talking about——

A. Oh, the question.

Q. That he said——

The Court (Interposing): You mean that at the trial at Seattle that gentleman testified that at a meeting in San Francisco with Mr. Humphrey and in Mr. Humphrey's presence, Mr. Humphrey said the following:——

Mr. Neblett: That is right.

The Court: I see.

So now you are denying that that——

The Witness (Interposing): Will you read it again, please?

By Mr. Neblett:

Q. You read it, Mr. Humphrey, so there will be no mistake about it, because it might be crucial, and I want to [435] be fair.

The Court: Maybe it would be easier for you to read it than to have to read it to you.

The Witness: Yes. Thank you.

The Court: Whose testimony is this the witness is asked to read?

Mr. Neblett: Mr. George W. Allen.

The Witness: Mr. George W. Allen.

Mr. Neblett: He was one of the parties who attended the conference.

(Testimony of William F. Humphrey,)

The Court: Just read it to yourself.

The Witness: I think Mr. Allen is greatly mistaken because he also says Mr. McCarthy was then present. Mr. McCarthy was not present at all. And I believe that he refers to sometime later, when they came down there. They had many visits here trying to buy the Rainier Brewery. But at that time I have no recollection of any such conversation, and especially I am convinced now when they mention Mr. McCarthy's name, because Mr. McCarthy was not present.

By Mr. Neblett:

Q. Now, Mr. Chadwick and Mr. Mackie testified, Mr. Humphrey, to statements of a similar import?

A. Yes, sir.

Q. Do you now say that it is your recollection that these gentlemen's memory was a trifle faulty?

A. I believe that they were entirely referring to some conversation at the time we were negotiating for the sale. There were negotiations going on over a period of time to buy the Rainier Brewing Company and all its assets, and I can't tell how many visits were made. All these gentlemen here are honorable men, and I know that none of them would deliberately make a misstatement under oath, but it could not have occurred then, because he mentioned Mr. McCarthy being present.

Q. I assume having drawn contracts yourself, Mr. Humphrey, on various occasions, preliminary drafts are sometimes drawn up?

A. Yes, sir.

(Testimony of William F. Humphrey.)

Q. Do you know whether that was done in this contract?

A. Well, I would say, without charging my memory, because I can't recall particular instances, I do recall this: that the negotiations took place in my office, and we concluded generally the understanding sometime about five o'clock. And then Mr. MacMillan joined us, and they were anxious to return to Seattle, and I asked Mr. MacMillan if he would not prepare the contract. Now, I have forgotten whether we changed—I know we prepared that night a draft, but whether there were more drafts prepared, I have forgotten.

Q. What I am coming to and trying to clear up is: Did this contract that was written down here with considerable [437] formality purport to express the agreement that you people had, or did you have some extraneous agreements not incorporated in the contract?

A. Well, I don't—the contract, of course, was intended to express the agreement that we then, the understanding we had then.

Q. And if the contract did not express the understanding you didn't know anything about it, is that right? About any oral agreements modifying this contract, is that right?

A. Well, no, I don't know any oral agreements at all. Of course, several times since, on the question that—probably I should not answer because you are not asking the direct question about the purchase or subsequent conversation.

(Testimony of William F. Humphrey.)

Mr. Mackay: Well, I think you are entitled to explain your answer.

Mr. Neblett: Certainly, he can explain his answer.

You go right ahead, Mr. Humphrey.

The Witness: The only situation, the question of what that contract meant has been several times interpreted according to the expressions in the papers that I have read from Seattle by the other parties.

By Mr. Neblett:

Q. Yes.

A. Now, I say that one—I had a copy received here. I don't know. [438]

You probably better let Mr. Neblett read it first.

Mr. Mackay: I am going to give you a photostat copy (handing document).

The Witness: This copy is the paper that was called to my attention. This contains a statement by Mr. Sick, and I will read the statement, if you wish. To the effect, anyway, that they had the right and privilege to purchase or acquire the perpetual rights to the trade name of Rainier for the State of Washington and the Territory of Alaska.

That was called to my attention at that time.

Mr. Neblett: If Your Honor please, we have no objection to this article, but we do object to the statement that it was purchased.

The Court: I certainly don't understand what materiality or revelancy a newspaper article can have in interpreting a contract and I should think it would be highly improper to consider it, certainly

(Testimony of William F. Humphrey.)

without some explanation. But so far as I know, no offer has been made. I haven't anything to rule on yet.

Mr. Neblett: Well, if Your Honor please, Respondent moves that any testimony with respect to that newspaper report be stricken from the record.

Mr. Mackay: I object to that, if Your Honor please. It is proper cross-examination. And I would like, if Your Honor please, at this time to have Your Honor consider this. [439] I have gone very thoroughly into the rules of evidence, and I recognize that ordinarily newspaper articles are not received as evidence, but I think under these circumstances that they are. And I would like to give Your Honor a copy and call Your Honor's attention to certain pieces of it, as well as to certain rules of evidence which I think make it admissible.

The Court: Well, I must say I have lost track of this. And Mr. Neblett is engaged in cross-examining the witness.

Mr. Neblett: That is right.

The Court: And he has not offered any newspaper article.

Mr. Neblett: No, and I don't intend to.

Mr. Mackay: I beg your pardon, if I am out of order, I am sorry.

The Court: I am afraid you are out of order, but how did this all come up anyway?

The Witness: I think I interjected it, Your Honor.

(Testimony of William F. Humphrey.)

Mr. Mackay: He gave it as an explanation in one of his answers.

Mr. Neblett: I can start fresh again here and straighten it out in a second, Your Honor.

By Mr. Neblett: [440]

Q. Mr. Humphrey, does this agreement here dated April 23, 1935, and the subsequent agreements that were entered into constitute your understanding of what the agreement of the parties was? Or did you have some oral agreements with the offices of the Seattle Brewing & Malting Company altering in any manner this agreement?

A. I had no oral agreements. I don't know what you refer to as the subsequent agreements. That contains the understanding we had.

The Court: This is the document in evidence, isn't it? Isn't this the whole document?

Mr. Neblett: Yes, that is right, Your Honor.

By Mr.Neblett:

Q. There was a trust deed, as you recall, and several others.

A. Oh, yes. This is the only agreement here.

Q. Yes.

A. That is correct. This agreement expresses the understanding I had at the time.

Q. And your recollection is now that the testimony of Mr. Chadwick and Mr. Mackie and Mr. Allen, with respect to this agreement as shown by the statements you read from this transcript is in error, is that right?

(Testimony of William F. Humphrey.)

A. I have no recollection of the statements having been made. [441]

Mr. Neblett: That is all.

The Court: Well, I understand you to say, then, that the agreement, which is Petitioner's Exhibit 1, represents the agreement made between the parties?

The Witness: Yes, Your Honor, and, of course, the trust deed too, but you haven't got the trust deed here.

The Court: Well, the trust deed is in evidence.

The Witness: Oh! I confine my answer to this agreement, I say that that is correct.

The Court: That is correct.

Mr. Neblett: If Your Honor please, it might be a good idea at this time—well, we can take that up tomorrow.

Mr. Mackay: Are you through with your cross-examination?

Mr. Neblett: Yes, I am through.

Mr. Mackay: I have one question.

Redirect Examination

By Mr. Mackay:

Q. Mr. Humphrey, did I understand you to say on direct or cross-examination that the Century people had tried to buy you out after this agreement was executed?

A. Yes, several times. Negotiations were carried on over the period of time off and on.

(Testimony of William F. Humphrey.)

Q. Was that with respect to buying the stock too?

A. Well, it was buying the stock or the assets; sometimes [442] the assets, and other times to buy the stock of the principal owners.

Q. I see.

A. I think when the stock was something like 90 per cent of the stock.

Mr. Mackay: I see. That is all.

Mr. Neblett: That is all.

Mr. Mackay: Do you have a question, Your Honor?

The Court: No.

Now, are you going to refer to this newspaper article?

Mr. Mackay: That is all, Mr. Humphrey, if you want to leave.

The Court: You are excused.

(Witness excused.)

The Court: Well, that is something you can take up without this witness.

Mr. Mackay: Yes, Your Honor.

The Court: Then it can be taken up tomorrow?

Mr. Mackay: That is true.

Mr. Neblett: Yes.

The Court: All right. I thought we would recess at this time until tomorrow morning.

Mr. Neblett: That is all right.

The Court: And then how many more witnesses have [443] you?

Mr. Mackay: Well, I have, if Your Honor please, I think it is three short witnesses. I think one won't take more than fifteen minutes. I don't think either one of them should take more than that.

The Court: And then are you going to call on your witnesses?

Mr. Neblett: Yes, Respondent has one witness, Your Honor.

The Court: All right.

Now we will recess until ten o'clock tomorrow morning.

(Whereupon, at 6:30 p.m., a recess was taken until 10:00 a.m., Saturday, July 21, 1945.) **[444]**

Proceedings July 21, 1945

Mr. Mackay: I would like to call Mr. Samet.

The Court: Mr. Samet has already been sworn. You have already been sworn?

Mr. Samet: Yes, Your Honor.

RUDOLPH SAMET

recalled as a witness for and on behalf of the Petitioner having been previously duly sworn was further examined and testified as follows:

Direct Examination

By Mr. Mackay:

Q. Mr. Samet I have in my hand here a copy of Articles of Incorporation of Rainier Brewing

(Testimony of Rudolph Samet.)

Company. The corporation was organized under the laws of the State of Washington in 1903.

Mr. Neblett I think you have already got a copy of it. I gave it to you the other day.

Mr. Neblett: The Articles of Incorporation?

Mr. Mackay: Yes.

Mr. Neblett: Well I have no objection to them, Mr. Mackay. I don't think we have a copy, though.

Mr. Mackay: We will see that you get a copy.

Mr. Neblett: All right.

Mr. Mackay: I would like to offer this in evidence, [449] if Your Honor please.

The Court: Any objection?

Mr. Neblett: No objection.

The Court: Received as Exhibit 33.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 33.)

[Petitioner's Exhibit No. 33 appears in Book of Exhibits.]

By Mr. Mackay:

Q. Mr. Samet, do you know why the Rainier Brewing Company was organized at that time?

A. It was a year before my time.

Q. I know, but do you know why it was organized? A. Yes, sir.

Q. Why?

A. To keep the name "Rainier" safe so that no other company could start under that name.

Q. I see. It just had a small capitalization?

A. Yes, at that time.

(Testimony of Rudolph Samet.)

Q. Yes. Now, Mr. Samet, do you recall—I think you testified before that you joined the Seattle Brewing & Malting Company in about 1904?

A. Yes.

Q. Do you recall about what the capacity in barrels of beer that was being manufactured at that time?

A. About; not quite 70,000 per annum.

Q. Yes. And do you remember about what the barrels [450] were in 1913?

A. In 1913? Oh, I think about 350,000 anyhow.

Q. I think the record shows around 310,000.

A. Oh, 310,000.

Q. Now, Mr. Samet, do you know whether the Seattle Brewing & Malting Company issued stock dividends prior to 1913? A. In 1913, yes.

Q. I say prior to 1913?

A. Oh, yes, they did.

Q. Will you please tell——

A. (Interposing) Now, I tell you, I don't know. I can't remember the year any more, but it was capitalized, the Seattle Brewing & Malting Company, for $1,000,000, and they paid 12 per cent dividend. Then we made out of the one million, two million. I can't remember the date, and it still was paid, they paid 12 per cent dividend on the two million. And then they made three million out of the two million, and still we paid 12 per cent on the three million. So, in other words, the original shareholder, he got 36 per cent dividend on his money.

(Testimony of Rudolph Samet.)

Q. Yes. Now, Mr. Samet, the record shows that during the fiscal year ending June 30, 1913, the Seattle Brewing & Malting Company spent $224,000 for plant and equipment, and for the fiscal year ending June 30, 1940, it spent $168,000 [451] for plant and equipment.

Now, can you briefly tell the Court what expansion took place in your plant at that time?

A. Now, first of all we—you know, to increase our capacity we needed additional cellars. We built not wooden cellars, or some of them were of wood—we built concrete, additional cellars, and then we bought gas lined tanks. You know, the gas lined tank was practically new at that time. It replaced the wooden tanks. We got a trainload of such gas lined tanks from the East to install in those new cellars.

Q. Now, when you speak of a "trainload," how many gas lined tanks would be on one car?

A. You know, it took one flat car to put a tank on.

Q. I see. And do recall approximately how much that increased your capacity?

A. Oh, it——

Q. I withdraw that question.

A. Do you mean the additional building?

Q. Yes.

A. Oh, at least for 150,000 more barrels, you know, because in 1915 when we closed up on the 31st day of December we sold 508,000 barrels of beer.

(Testimony of Rudolph Samet.)

Q. Now, I think you also testified that in 1915 you became President of the Rainier Brewing Company in San [452] Francisco?

A. Became Vice President and General Manager when I came down here. I had that position up there sometime before.

Q. And can you state whether or not subsequent to 1915 the Rainier Brewing Company, which was then operating in San Francisco, shipped beer into Washington? A. Yes, they did.

Q. What percentage of alcohol? A. 2.75.

Q. And that was permitted at that time?

Permitted legally, but only to private consumers.

Q. Yes.

A. We couldn't deliver any for selling.

Q. That is the alcohol content of the beer?

A. That was the percentage for up there.

Q. Yes. Did you have an opinion in 1913, Mr. Samet, regarding the going concern value of the Seattle Brewing & Malting Company?

A. Regarding what, please?

Q. The going concern value of the Seattle Brewing & Malting Company?

A. You mean what it——

Q. (Interposing) What it was worth?

A. What it was worth if somebody wanted to buy it?

Q. Yes, the whole thing? [453]

Mr. Neblett: That is all right. It is a preliminary question.

(Testimony of Rudolph Samet.)

By Mr. Mackay:

Q. I asked you if you had an opinion as to the value as of March 1, 1913, of all of the assets of the Seattle Brewing and Malting Company?

A. Oh, yes, I have.

Q. What was that opinion?

Mr. Neblett: Just a minute, Mr. Mackay. If your Honor please, the question is objected to on the ground that is not the issue in this case. The issue in this case is the March 1, 1913, value of the sole and exclusive right to manufacture and market beer and other alcoholic beverages under the trade name Rainier in the State of Washington and the Territory of Alaska.

The Court: It is a preliminary question, isn't it?

Mr. Mackay: Well, if your Honor please, to be very frank, there seemed to be a little confusion the other day about this. I was merely going to ask this witness what his opinion was at that time of the value of the whole business. I was not going into anything other than that, because after that, with the other testimony we have, we have worked out the value of the good will. I think it is quite proper and would certainly help to clear up the situation, as I see it. [454]

The Court: Objection overruled.

You may answer the question.

A. Oh, I would think about 4½ million.

By Mr. Mackay:

Q. Four and a half million dollars?

A. Yes, sir.

(Testimony of Rudolph Samet.)

Q. Now, did the Seattle Brewing & Malting Company prior to 1913 sell anything other than beer or alcoholic products? A. No.

The Court: Just let me ask the witness this question:——

Mr. Mackay: Yes.

The Court: I think that, according to the balance sheets, $4,500,000 was the book value of the whole concern, wasn't it?

Mr. Mackay: I think, if your Honor please, that there was a capitalization of about three million.

Where is that balance sheet?

The Court: Let me see. We have balance sheets.

Mr. Mackay: That is No. 1, I think.

The Court: I think we ought to see what the witness' opinion is, whether it is book value or——

The Court: (Interposing) It is 16.

Mr. Mackay: 16. I have it, your Honor. [455]

The Court: Well, now, Exhibit 13—is it?—entitled "Seattle Brewing & Malting Company balance sheets for periods ending in various years, including 1911 and 1912."

Now, we have a total value of the entire business. As I understand it, this is a balance sheet for the business of the company as it was conducted in California and in Washington.

Isn't that correct?

Mr. Mackay: Yes, your Honor.

The Court: Well, the book value of the entire business, total assets, was $4,414,000; earned surplus was $2,042,000; capital was $2,000,000; total

(Testimony of Rudolph Samet.)

capital surplus was $4,042,000; and then there were some other items that brought up the total value of the business to $4,414,000.

I suppose in the stipulation of facts it is shown what the assets of the entire business comprised, but you may not have covered that. With all of the testimony that has been presented, I am not sure that the testimony has made it entirely clear, though, how far the business of Seattle Brewing & Malting Company extended in 1913.

The reason I can't be sure of that is because some of the facts have been stipulated, and a good deal is covered by the 33 exhibits of the Petitioner.

Mr. Samet, in 1913 you were associated with the Seattle branch of the business, is that correct?

The Witness: Over the whole, with the whole thing.

The Court: No; in 1913 were you still in Seattle?

The Witness: Yes, your Honor. I went away on the—about in November of 1915 I came down here.

The Court: What was your capacity in the corporation in 1913?

The Witness: I was General Manager at that time.

The Court: General Manager of what?

The Witness: Of the Seattle Brewing & Malting Company.

The Court: Of the entire business?

The Witness: Yes, your Honor.

The Court: Was the main office in Seattle?

(Testimony of Rudolph Samet.)

The Witness: Yes, your Honor.

The Court: And where did the Seattle Brewing & Malting Company in 1913 sell its products?

The Witness: We sold—the bulk of the business was done in the State of Washington, I know that, but we sold here in California quite a great deal. We sold it to John Rapp & Son. He was then our agent. Then we sold beer in Los Angeles. We went as far, nearly, as Billings, Montana.

The Court: Did you sell beer in Oregon?

The Witness: Yes, your Honor. [457]

The Court: Oregon, Washington, California?

The Witness: Montana. Billings, that is as far as we went on account of the freight trains. If we go further they were against us.

The Court: Nevada?

The Witness: Yes.

The Court: Utah?

The Witness: No, not very much Utah, no. We sold some, but hardly worthwhile.

The Court: Idaho?

The Witness: Yes, we sold in Idaho.

The Court: How far south did you go? Into Arizona, New Mexico?

The Witness: No, as far as Los Angeles, San Diego; Los Angeles and San Diego in California.

The Court: I see. And in those States you sold through agents, is that right?

The Witness: Yes, we had agencies in some of them. Now, take in San Francisco, we had John Rapp & Son. He had his own bottling works at

(Testimony of Rudolph Samet.)

that time, and he bottled our products here under "Rainier." In other places we had a paid man, you know, an agent under salary.

The Court: Now, when you say that in your opinion the going concern value of the entire business of Seattle Brewing & Malting Company in 1913 was $4,500,000, is that [458] just a round figure?

The Witness: That is just—you know, I think, that if anybody would have come and said "I want to buy the plant," which nobody came, but that is about the least they would have taken. I don't think they would have taken that.

The Court: That is a little more than the book value of the business?

The Witness: Yes, but not much more.

The Court: Well, according to that exhibit it is almost $500,000 more.

The Witness: Well, in my estimation, you know, it would have been worth four and a half million as the seller.

The Court: It is pretty far back. Well, I just wanted to see what the difference was between your opinion and the value of the business as shown in the balance sheet.

That is all.

By Mr. Mackay:

Q. Now, Mr. Samet, when you speak about $4,500,000, do you mean just the plant——

A. (Interposing) And the name.

Q. Yes, and not the investments, not the stocks and bonds that you may have had?

(Testimony of Rudolph Samet.)

The Court: Well, if you are going to examine the witness in that way, then I think that I will have to rule [459] that you will have to go through the whole procedure. Now, objection was made and I overruled the objection. This witness was a general manager of the business, but he was not president of the corporation.

Who was the president in 19——

The Witness: (Interposing) At that time Louie Hemrich.

The Court: Well, the point is if you are going to place very much reliance on the opinion of this witness, then you will have to qualify him and do the whole job.

Mr. Mackay: Well, if your Honor please, I will withdraw all the testimony in respect to value. I realize he was just a general manager and not a president.

The Court: Well, the point is that your last questions now, you want him to break down the value and to say what he includes in his value, what he eliminates.

Let me see that balance sheet. I have it here.

Your last question is whether that value included or excluded investments. Well, you haven't shown that the witness knows what the investments were in 1913, or what they consisted of, or what the fair market value of the investments was. The investments are included in the balance sheet as an asset, and the investments are rather large. So that would

(Testimony of Rudolph Samet.)

trouble me as I read the record. That would seem to be a question that I would want to have [460] developed a little further.

Mr. Neblett: If your Honor please, could I state at this point that this Exhibit 13 shows good will as of 1912 as $338,671.31.

The Court: Well, we weren't talking about good will at this point. We were talking about investments, but then that is a point, I suppose.

Mr. Neblett: Yes, I just wanted to make that point.

The Court: All right. Will you go ahead?

By Mr. Mackay:

Q. Well, Mr. Samet, did you have an opinion in 1913 as to the value of the trade name Rainier?

A. Yes.

Q. What was your opinion?

A. That is, you know, before my coming to Seattle there was not so much Rainier sold, but after 1913 it has grown tremendously, the sales increased and increased and increased, and especially the bottled beer sales.

Now, you know when I came to Seattle bottled beer——

The Court: (Interposing) Well, I think the witness is going beyond the scope of the question.

Did you say that you did have an opinion?

The Witness: Yes, I did.

The Court: Well, that is all. [461]

The Witness: I did. The——

The Court: (Interposing) The answer is "Yes". Now what?

(Testimony of Rudolph Samet.)

By Mr. Mackay:

Q. What was your opinion on the value of the trade name Rainier?

Mr. Neblett: If Your Honor please——

A. My opinion was——

The Court: (Interposing) Just a minute.

Are you making an objection?

Mr. Neblett: Yes. The question is objected to on the ground that the witness has not been shown to be familiar with the conditions existing as of March 1, 1913.

The Court: Objection sustained.

By Mr. Mackay:

Q. Well, now, Mr. Samet, you were the general manager of that business in carrying on its operations, were you not?

A. Yes, sir, of the whole thing, and all the operations and everything.

Q. Yes. Now, what would you think would be the fair market value of the brewery and the trade name as a going business?

Mr. Neblett: If your Honor please, the question is objected to. It has not been shown that this witness knows [462] what the conditions were as of March 1, 1913. Secondly, the witness has not been shown to be an expert in the sense of valuing a trade name, and, thirdly, there is no evidence in this record that this witness is qualified by that special knowledge other than being just general manager to appraise the value of the trade name and good will as of March 1, 1913.

(Testimony of Rudolph Samet.)

The Court: Mr. Mackay, I realize that Mr. Samet was the general manager, and from what he has said I think it is apparent that he was very familiar with the conduct of the business, but the question of how to value a business, how to value good will, how to value a trade name is a very special thing, and you certainly haven't asked the foundation questions of this witness that would indicate that he had a fair and objective opinion on the point of value. Now, since that is such an important question in this case, and we have had two expert witnesses testify about that, I feel that that objection should be sustained for the present at any rate.

Mr. Mackay: Well, I think your Honor is right. I think that the witness has not been qualified.

You may take the witness.

Mr. Neblett: Mr. Samet, just one or two questions.

Cross Examination

By Mr. Neblett:

Q. In 1913 wasn't Seattle Brewing & Malting Company shipping beer to the Orient? [463]

A. Yes, we did.

Q. Tell the Court briefly about your export trade as of March 1, 1913.

A. I personally went to the Orient and opened up agencies, changed agencies of the existing ones, and, take, we sold—what do you want to know? I don't remember the figures, how much we sold, but we sold quite a great deal.

(Testimony of Rudolph Samet.)

Take in Honolulu, in Shanghai, in Manila, in Singapore, and even in Calcutta, but all—you know, as I say, it was all Rainier bottled beer.

Q. Now, have you covered generally all the export trade that Seattle Brewing & Malting Company did as of March 1, 1913, that you now can think of?

A. Yes. Oh, there is some, but it didn't amount —to South America, but not much.

Q. To South America, you say?

A. Yes, sir.

Q. You did then have some export trade to South America? A. Yes, sir.

Q. As of what date?

A. Oh, before 1913. We had some in 1911, and '12. We had some export trade.

Q. Yes. How about Mexico?

A. How much? [464]

Q. How about Mexico?

A. Mexico? No.

Q. No export trade to Mexico?

A. No, no.

Q. Mr. Samet, I believe you spoke about the capacity of the Seattle Brewing & Malting Company as of December 31, 1913, is that right?

A. The capacity?

Q. Yes.

A. We were assured of capacity as we kept on growing, and that is where we added to the——

Q. (Interposing) What was your capacity as of March 1, 1913, of the Seattle Brewing & Malting Company?

(Testimony of Rudolph Samet.)

A. Let me think. That is over thirty years ago. Let me think. We could have turned out there about 350—from 300 to 350,000 barrels.

Q. In how long a period of time?

A. Per annum.

Q. Per annum? A. Yes, sir.

Q. Now, you say that owing to certain monies spent in 1913 this capacity was increased about 150 barrels, is that right? A. 150,000 barrels.

Q. I mean 150,000 barrels. I stand corrected, Mr. Samet. [465]

And now will you tell us what the books show with respect to the tangible assets of Seattle Brewing & Malting Company as of March 1, 1913?

A. You mean the amount of tangible——

Q. (Interposing) Yes, yes.

A. Well, how could I remember that?

Q. Well, just give us some estimate there of what it—the records show here. You have heard it half a dozen or more times.

A. I don't want to—really, I can't remember it.

Q. Well, don't you recall about three and a half, four million dollars? A. About what?

Q. About three and a half or four million dollars?

A. Oh, you mean the assets of the company you want?

Q. Yes. A. Yes, about that.

Q. And do you recall now how much money was spent in these betterments as of March 1, 1913?

A. For the improvements?

(Testimony of Rudolph Samet.)

Q. Yes.

A. Oh, about, I think, in all, a little over $300,000. I think so.

Q. So by spending approximately $300,000 on an investment of approximately three and a half, four million dollars [466] you increased the capacity approximately 50 per cent, is that right?

A. Well, it isn't 50 per cent. I will tell you when you increase your capacity you don't in a brewery—you know, it is the adding of cellars, machinery, your machinery which you have in the brewery, they are able to turn out more than you turn out. You buy them big enough. Now, take a kettle—we didn't need a new kettle or anything, just storage capacity and vats to put the beer in, and that don't amount to much. The rest, you get along with the machines you have on hand, you know. You buy a kettle holding—you can make in one brew 500 barrels, and, maybe, you use only 350 barrels at one brew, but you buy your equipment large enough in the beginning so that you don't need to replace or add new ones when you need it.

Q. I see. Mr. Samet, my only point was that on this investment of three and a half or four million dollars you spent—made improvements of approximately $300,000, and by doing so you increased your capacity 50 per cent.

That is just about right, isn't it?

A. Yes, you do.

(Testimony of Rudolph Samet.)

Mr. Neblett: That is all.

The Witness: Yes, you do.

Mr. Neblett: That is all, your Honor.

Mr. Mackay: That is all. [467]

The Court: You are excused.

The Witness: Thank you.

(Witness excused.)

Mr. Mackay: Call Mr. Goldie.

JOSEPH GOLDIE,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your full name?

The Witness: Joseph Goldie, G-o-l-d-i-e.

By Mr. Mackay:

Q. Mr. Goldie, you are now President of the Rainier Brewing Company? A. Yes, sir.

Q. And you have been President for how long?

A. Since, I believe, 1938.

Q. Yes. Prior to that time were you a resident of Seattle?

A. Quite a bit before that time.

Q. When were you a resident of Seattle?

A. I left there in 1915.

Q. You left there in 1915? A. Yes, sir.

Q. And prior to 1915 you had been a resident of Seattle for a number of years, had you?

(Testimony of Joseph Goldie.)

A. Yes, sir, since 1900.

Q. And what had been your business up there?

A. I was at one time in the wholesale liquor business up there.

Q. Were you in the wholesale liquor business in 1913? A. Yes, sir.

Q. Will you please tell the Court whether or not you made any investments in the liquor business in 1913 in Seattle, or Washington?

A. Yes, sir. In the Fall of 1912 our company, known as the Goldie Klenert Company, made an extensive investment in the City of Everett, which is about 30 miles north of Seattle. We opened up what was known as the Everett Liquor Company.

In the Spring of '13 I helped finance a liquor establishment known as the Mission Liquor Company for a brother of mine, Charles E. Goldie in the City of Seattle.

Those are about the only two that I recall that we invested in in '12 and '13.

Q. Well, were you familiar with the activities of the people who wanted it dry up in Seattle in 1913?

A. Well, the first experience that I have had, that I recall, where there was any activity on it, among the drys, [469] was the opening up of 1914. We had a man in the City of Seattle by the name of Dr. Matthews, a Presbyterian Minister, who started the fight for prohibition.

As I was standing in front of my place of business (I don't recall just what month, but I know it was in the Spring of '14) we saw a parade headed

(Testimony of Joseph Goldie.)

down the street, headed by Mr. Matthews, mostly women folks marching with white flags in behalf of making the State dry.

That was the first activity that I saw in the City of Seattle pertaining to making the State dry.

Q. Now, Mr. Goldie, you were familiar, were you, with the Tacoma Brewing Company?

A. At that time or recently?

Q. Subsequently? A. How?

Q. Subsequently? A. Yes.

Q. I think the Pacific Products Company purchased it, or, I mean the Tacoma Brewing Company, didn't it?

A. Well, we did that, we purchased the Rainier Brewing Company, or the Seattle Brewing & Malting Company in 1925 during prohibition here in San Francisco, a group of us, and thereafter we purchased the Tacoma Brewing Company in 1927.

Q. Yes. And did it put out a beer under the trade name Tacoma? [470] A. Yes, sir.

Q. Will you please tell the Court what the Pacific Products Company—I will withdraw that.

Did the Pacific Products Company thereafter sell beer under the name Tacoma for a while?

A. We sold it from the time we bought it. We made near beer, and when the repeal came for real beer we sold Tacoma beer, as well as Rainier, under the name of Tacoma.

Q. Well, did you sell very much Tacoma?

A. Not very much. We sold more near beer than we sold the real beer.

(Testimony of Joseph Goldie.)

Q. Had the Pacific Products Company prior to the repeal of prohibition sold near beer?

A. That was all we could sell, sir.

Q. And the Seattle Brewing & Malting Company also sold near beer after prohibition?

A. Of San Francisco you are speaking of?

Q. Yes, sir.

A. Yes, sir. We shipped our near beer up to Seattle in those days.

Q. Do you remember the content of alcohol in that near beer?

A. One-half of 1 per cent.

Q. Now, Mr. Goldie, do you remember when the San Francisco, I mean when Rainier built the San Francisco [471] Brewery? A. When what?

Q. When Rainier built the San Francisco Brewery?

A. In 1915 the Seattle Brewing & Malting Company came to San Francisco to build its brewery, its new brewery after the State had voted dry in the State of Washington.

Mr. Mackay: You may take the witness.

Cross Examination

By Mr. Neblett:

Q. I believe you stated you financed your brother in the beer business, or the whiskey business?

A. Oh, it was a cafe and liquor business; no beer business.

Q. No beer business? A. Yes.

(Testimony of Joseph Goldie.)

Q. Where was that?

A. Located on Second Avenue, called the Mission.

Q. Seattle, Washington? A. Yes, sir.

Q. When was that? A. In 1913.

Q. When did you commence to finance him up there?

A. Well, I had financed him in prior years.

Q. Where? A. In other places in Seattle.

Q. Other places? A. Yes.

Q. How much prior?

A. Oh, I think two or three years prior to that.

Q. So you didn't commence to finance him in 1913 as your testimony in chief indicated, but had been financing your brother previously to that time?

A. Yes, sir.

Q. Is that right?

A. I had financed him previously, yes.

Q. And how much money did you let him have?

A. We put up $30,000 in cash for that particular place. He only had a half interest in it; he had another man in with him, but I can't recall his name.

Q. How much did you put up of the $30,000?

A. I put up $15,000 of it.

Q. Now, this other business that you financed, where was that?

A. Everett, Washington.

Q. And when did you commence at that business?

A. When? I am sure it was in the Fall of '12, 1912.

(Testimony of Joseph Goldie.)

Q. Are you sure or not now. Can't you give us some better judgment on that?

A. I can't. It is a good many years ago, and I tried to find some data on that, but I couldn't. [473]

Q. It might have been 1910, is that right?

A. No, no, I am sure of that, because the business was not successful, and I knew that we did not get our investment out of it when prohibition finally closed us. We lost considerable money on it.

Q. On that transaction? A. Yes, sir.

Q. Yes. Well, how about the Seattle transaction? Did your brother——

A. (Interposing) No, that didn't prove a success either. We lost money on both of them.

Q. You lost money on both of them?

A. Yes.

Q. How much money?

A. I couldn't answer that.

Q. Everything you put in?

A. Oh, no! Oh, no! We got back part of it.

Q. What is your connection with Rainier Brewing Company at the present time?

A. I am the President.

Q. Of the Petitioner in this case?

A. How?

Q. The Petitioner in this case, you are the President of——

A. (Interposing) I am the President of the Rainier [474] Brewing Company, yes, sir, of California.

(Testimony of Joseph Goldie.)

Q. How much stock do you own in the company?

A. I own 22 per cent of the company, 65,000 shares, that is, my family and myself.

Q. How long have you owned that interest?

A. Practically from the—well, I didn't own quite as much when we bought it in 1925. I had about 20 per cent. But I bought about 2 per cent of it during the intervals from the time we bought it in 1925.

Q. Mr. Goldie, you said "a group of us", I believe was the way you expressed it, "purchased Rainier in 1925"? A. Yes, sir.

Q. Is that right? A. Correct, sir.

Q. Did you purchase assets of Rainier and/or Seattle Brewing & Malting Company, or did they purchase stock of the Seattle Brewing & Malting Company?

A. We bought the entire stock. Well, we bought first the controlling interest and then picked up the minority stock as we went along. We, up to this time, never were able to get at a hundred per cent. About 8 per cent of the old stockholders are still in existence and still have stock in the company.

Q. Yes. How much did you pay for it?

A. We paid in the neighborhood of $1,050,000, is what [475] it cost us in 1925. That is for Rainier alone.

Q. Now, you say "in the neighborhood."

Can't you estimate that a little bit closer?

(Testimony of Joseph Goldie.)

A. Well, it may have been ten thousand more or ten thousand less.

Q. That was approximately it?

A. Yes, sir.

Q. How was it paid for? What was the form of consideration that passed? A. Cash.

Q. Cash? A. Yes, sir.

Q. And what was that date?

A. April, during the month of April, 1925.

Q. April, 1925? A. Yes, sir.

Q. How much stock did you purchase, Mr. Goldie, for the amounts you stated?

A. You mean the group or myself personally?

Q. The group.

A. The group? The first purchase we made was a controlling interest in the City of Seattle which amounted to 12,500 shares. We bought that at $59 a share.

The Court: Shares in what corporation?

The Witness: Shares of the Seattle Brewing & Malting [476] Company, Seattle, Washington. We paid $59 a share for 12,500 shares.

By Mr. Neblett:

Q. What?

A. Pardon me. There were 20,000 outstanding at the time. 12,000 was the capitalization at this time out of a total of 20,000 outstanding at the time.

Q. Mr. Goldie, that was the Seattle Brewing & Malting Company, the West Virginia corporation?

A. Yes, sir.

(Testimony of Joseph Goldie.)

Q. Which owned the stock of the Rainier Brewing Company?

A. That is correct, sir, that is correct.

Mr. Neblett: That is all.

Mr. Mackay: Just a moment.

Redirect Examination

By Mr. Mackay:

Q. Mr. Goldie, do you know whether or not the Century Brewing Company since 1935 has used the Georgetown Brewery as a brewery?

A. No, sir, at no time.

Mr. Mackay: That is all.

Mr. Neblett: That is all.

The Court: Just before the witness leaves the stand, Mr. Mackay, you have offered in evidence the Articles of Incorporation of the Rainier Brewing Company, the corporation [477] that was organized on September 19, 1903.

That is Exhibit 33.

Mr. Mackay: That is right.

The Court: Now, may I have the stipulation of facts, that is, we have three stipulations of facts.

Mr. Mackay: Yes. It is one of re-organization.

The Court: Now, would you indicate to me, as you are acquainted with the paragraphs there, the paragraphs that cover the corporate history of these various companies?

Mr. Mackay: Oh, yes. If your Honor please, this is in Stipulation No. 1, and the re-organization

(Testimony of Joseph Goldie.)

referred to there is the re-organization whereby Pacific Products Company acquires all the assets of the——

The Court: (Interposing) Well, what I want to know how many paragraphs in there describe the facts that give the history of these corporations?

Mr. Mackay: Oh, it is paragraph 1 that has relation to, I mean of the stipulation has to do with that.

The Court: Only paragraph 1?

Mr. Mackay: We have three re-organizations, if your Honor please.

The Court: Well, then, I had better look at this.

Mr. Mackay: And I might state for your Honor's information in 1925 Pacific Products Company was incorporated and it took over all the assets of this Rainier Company, which [478] was organized in 1903 as well as the Seattle Brewing & Malting Company, and that is set up in the pleadings.

The Court: Well, where in your stipulations have you the facts relating to the Seattle Brewing & Malting Company that was organized in 1903, and its organization and ownership of the Rainier Brewing Company which was organized at the same time in 1903? Where are the facts relating to——

Mr. Mackay: (Interposing) They are set forth in the pleadings, if your Honor please.

The Court: They are set forth in the pleadings?

Mr. Mackay: They are set forth in the pleadings.

The Court: May I see the pleadings, please?

The Clerk: Yes (handing documents).

(Testimony of Joseph Goldie.)

The Court: It will save me the time for hunting for this later. I want to know where the facts are because they are scattered all over now.

Mr. Mackay: If your Honor please, I might call your attention to the answer.

The Court: Well, if you don't mind, let me look at the petition first.

I am looking now at paragraph 5 of the petition, which is the original petition filed May 12, 1944. I don't know what the amendments, if any, if there are any, may do to the original petition. But in paragraph 5 it is recited that the petitioner in this proceeding is the California corporation. [479] It doesn't say what year it was organized in.

You have given me a chart which is not marked as an exhibit and probably will have to be marked as an exhibit. But according to this chart the petitioner, which has the name Rainier Brewing Company, Inc., is a California corporation organized in 1932.

Is that correct?

Mr. Mackay: Yes, your Honor.

The Court: Now, what were the assets of the Rainier Brewing Company organized in 1903?

Mr. Mackay: I beg your pardon. I didn't understand you.

The Court: I say what were the assets of the Rainier Brewing Company organized in 1903?

Mr. Mackay: I understand there was just $10,000.

(Testimony of Joseph Goldie.)

The Court: It was a nominal corporation?

Mr. Mackay: That is right.

The Court: It had no assets?

Mr. Mackay: That is right.

The Court: It was not an operating company?

Mr. Mackay: That is right.

The Court: And how many shares of stock were issued?

Mr. Mackay: I understood there were 10,000 or at least that was the total par value; 100 shares I am told. [480]

The Court: A hundred shares. Well, in paragraph V(c) of the petition, pages 3 and 4, it is said that in 1903 the Rainier Brewing Company was organized. It doesn't say who owned the stock of Rainier Brewing Company.

Who did own the stock of Rainier Brewing Company?

Mr. Mackay: The stock was all owned by the Seattle Brewing & Malting Company. I think that is in the stipulation.

The Court: And that is somewhere in the stipulation?

Mr. Mackay: Yes, your Honor.

I might say, if your Honor please, that the only thing that was denied in "C" of our petition was the last sentence where we had alleged in the same year a corporation was organized under the laws of the State of Washington known as Rainier in order to further protect the name of Rainier, and that is the reason I put in this exhibit to show that.

(Testimony of Joseph Goldie.)

The Court: Well, of course, the exhibit in itself doesn't show it.

Mr. Mackay: Well, I mean it shows the date of incorporation.

The Court: Well, that apparently isn't denied.

Mr. Mackay: Yes, your Honor.

The Court: I wanted to be sure what the assets of that company were. [481]

Well, then, as I understand, the parties are agreed that the Rainier Brewing Company, organized in 1903, was an inactive corporation, with no assets other than paid-in capital, which was paid in for its stock. 100 shares of stock with a par value of $100 a share or $10,000 capital, were issued to Seattle Brewing & Malting Company, and that at all times that company, organized in 1903, owned all the stock of Rainier Brewing Company.

Mr. Mackay: Yes.

The Court: Now, when the Pacific Products Company acquired the assets of the Seattle Brewing & Malting Company did they acquire all of the stock of the subsidiary organized in 1903?

Mr. Mackay: They acquired all the assets, your Honor.

The Court: Oh, they acquired all the assets of Seattle Brewing & Malting Company?

Mr. Mackay: Pacific Products Company acquired all the assets of Seattle Brewing & Malting Company as well as all of the assets of the Rainier Company.

The Court: What assets did Rainier Company

(Testimony of Joseph Goldie.)

have? I don't think there is any proof on that point, unless it is stipulated. That is what I am inquiring into now. The Exhibit 33, of course, is just a copy of the Articles of Incorporation and in itself is not evidence of what the [482] assets of the corporation were.

Mr. Mackay: I should have made this clear.

Attached to Exhibit 1, if your Honor please, is a——

The Court: (Interposing) It is attached to Stipulation 1?

Mr. Mackay: Yes, your Honor.

(Continuing)—are two assignments showing what assets were transferred by Rainier as well as by Seattle Brewing & Malting Company to Pacific Products, Ltd.

I might state that subsequent to 1915 the Rainier Company did get other assets.

The Court: Well, Exhibit "B" attached to Stipulation 1 is an assignment from Rainier Brewing Company to Pacific Products Company, Inc., dated October 1, 1925, and it is a brief assignment. It simply recites that "In consideration of $10 Rainier Brewing Company—", which was the corporation organized in 1903, "—transferred all of its assets of every character, including goodwill, trade name, trade mark, trade label, copyrights, and the full benefit thereof, and the party of the second part accepts the foregoing assignment and in consideration thereof assumes all the liabilities of the party of the first part as shown by its books of ac-

(Testimony of Joseph Goldie.)

count on September 30, 1925, not exceeding in the aggregate the sum of $200,060."

And then Exhibit "A" attached to that Stipulation 1 is [483] the assignment from Seattle Brewing & Malting Company to Pacific Products, dated October 1, 1925, and it recites that "In consideration of $10 Seattle Brewing & Malting Company assigns all of its assets of every kind, including its goodwill, trade name, trade mark, trade label, and all of its right, title and interest in and to all real and personal property, and the party of the second part accepts the assignment and assumes all the liabilities as shown by its books of account on September 30, 1925, not exceeding in the aggregate the sum of $29,776.37."

Well, now, that would be very confusing to me. Here is the Rainier Brewing Company, which has no assets except nominal assets, and, nevertheless, according to the assignment, has liabilities at least in the amount of $200,000, whereas the parent company has liabilities in an amount of at least $29,776.00.

These formal indentures often do not state a great many facts; they are formal. And I am wondering now if anywhere in the pleadings which are admitted and in the stipulations that are in the record it is stated what the new worth according to the books of the Rainier Brewing Company was, the company that was organized in 1903, at the time of the assignment in 1925?

(Testimony of Joseph Goldie.)

In other words, you have offered Exhibit 33 for this purpose: To show that the Rainier Brewing Company was [484] organized to hold, as I understand it, the trade name, but, of course, Exhibit 33 doesn't establish that fact. It is a formal Articles of Incorporation and necessarily covers a great deal. It is an all-inclusive authorization to conduct business as a corporation, that is all it is, as a charter; it doesn't establish the fact of what the outstanding stock was at any time, the issued stock, or what the assets were according to books or anything else.

I don't know, of course, now how material that may be, but I do know that a little bit of evidence is a dangerous thing, such as Exhibit 33 because it puts upon me the burden of going through this entire record to find out what Exhibit 33 is supposed to tell me, namely, what assets Rainier Brewing Company had, how they carried it on their books, how the stock of the Rainier Brewing Company was carried on the books of the Seattle Brewing & Malting Company.

That may be very important because of the question presented involving the fair market value in 1913 of the trade name Rainier.

I hope I am not inquiring into this unnecessarily. Counsel can end my inquiry by very quickly answering my questions.

Mr. Mackay: Yes. Well, I think, if your Honor please, if I may be permitted to make this observation, the only purpose in offering the Articles of

(Testimony of Joseph Goldie.)

Incorporation [485] was to show that this was incorporated in the State of Washington in 1903.

The Court: Well, I think that is admitted in the pleadings.

Mr. Mackay: No, that is one thing that was denied, your Honor. That is the reason I had to put it in.

The Court: I thought—well, all right. It may be that the denial was with respect to the words in that paragraph in the petition "—in order further to protect the trade name Rainier."

Now, that involves a conclusion in your statement of a fact in the petition, and it may be that the denial went to that.

I don't think that Respondent would deny that that corporation was organized in 1903, knowing the facts, if respondent knew the facts at that time.

At any rate, at the present time I am quite sure that Respondent won't deny that there was a corporation under that name organized in 1903. Now, that still doesn't answer my question.

What facts are there in the record before me at the present time which answer my question as I have set them forth to you?

Mr. Mackay: Well, may I make this further observation? There was a little dispute between us as to what State [486] this corporation was organized in, and that is the reason we got this.

Now, the witness, I think, Mr. Samet—what I intended to bring out was the corporation was organized merely to protect the corporate name

(Testimony of Joseph Goldie.)

Rainier so that no other corporation could use that because the pleadings all show that the trade name Rainier had been owned all the time by Seattle Brewing & Malting Company, so until the subsequent mergers Rainier didn't have that trade name, and that is the reason we didn't get all the——

The Court: (Interposing) It isn't as simple as that to me, I am sorry, because I don't want to prolong this discussion.

The point is, of course, the Virginia corporation, West Virginia corporation organized in 1903. It had the corporate name of Seattle Brewing & Malting Company.

Mr. Mackay: Yes.

The Court: However, as I understand the facts, after it was organized, and certainly from 1910 on, it sold a product known as Rainier beer.

Isn't that correct?

Mr. Mackay: The Seattle Brewing & Malting Company?

The Court: Yes.

Mr. Mackay: Yes, your Honor.

The Court: It sold a product which bore the name [487] Rainier.

Mr. Mackay: That is right.

The Court: It was using the name Rainier.

Mr. Mackay: That is right, your Honor.

The Court: That is a fact, even though the corporation was not called the Rainier Brewing Company?

Mr. Mackay: Yes, your Honor.

(Testimony of Joseph Goldie.)

The Court: But it was called the Seattle Brewing & Malting Company.

Mr. Mackay: That is right.

The Court: Now, when the Seattle Brewing & Malting Company was organized in 1903 it was a new corporation which succeeded a Washington corporation having practically the same name, which was organized in 1893.

Mr. Mackay: That is right, your Honor.

The Court: Now, did the old corporation sell beer under the name of Rainier?

Mr. Mackay: Yes, your Honor, that is admitted in the pleadings.

The Court: All right. Then from around the turn of the century in 1900 a product was marketed that used the name Rainier?

Mr. Mackay: That is right.

The Court: Now, the corporation, Rainier Brewing Company, was organized in 1903 at the same time that Seattle [488] Brewing Company was organized, and in that corporation appears the name Rainier.

If that is all there is to it, that is fine, but if you are going to argue that Rainier was not an asset, the name Rainier was not an asset of Seattle Brewing & Malting Company because another corporation, Rainier Brewing Company, was organized to hold that name as an asset, then I would say there aren't any facts to show that.

Mr. Mackay: Yes. Well, your Honor——

(Testimony of Joseph Goldie.)

The Court: (Interposing) So I am trying to find out what you are going to argue about in this respect, and it may be very unimportant, but I want it to be put at rest now.

Mr. Mackay: Yes, that is right. I appreciate your Honor bringing this up.

It is our contention that the Seattle Brewing & Malting Company owned the trade name Rainier, and this Rainier Company that was organized in 1903, the only purpose that we put this in for was merely to show it was organized in there merely to protect the corporate name of Rainier so other people couldn't get a corporate name by that, and we are still contending that all the value of the trade was owned by the Seattle Brewing & Malting Company, and we will not argue at all that it belonged to the one that was incorporated in 1903 by the name of Rainier—— [489]

The Court (Interposing): So it is immaterial whether the Rainier Brewing Company had any books and whether it had any assets?

Mr. Mackay: That is the way we have looked upon it, your Honor.

The Court: And it is also immaterial what price or book value the Seattle Brewing & Malting Company put on the stock of Rainier Brewing Company which they held as an asset?

Mr. Mackay: We think that is immaterial.

The Court: That is all immaterial, and it is unnecessary for me to be concerned about it?

Mr. Mackay: I think so.

(Testimony of Joseph Goldie.)

The Court: That is the reason those particular facts have not been stipulated?

Mr. Mackay: Yes. I might make this observation, if it will help clear it: This same company, Rainier, that was organized in 1903, in 1915 operated down in San Francisco, beginning in 1915 as a subsidiary. I think that will clear it up.

The Court: In 1915 it became an operating company?

Mr. Mackay: Yes, your Honor, down here in San Francisco.

The Court: I see. Well, then, when it became an operating company in 1915 then it had to have some assets?

Mr. Mackay: Yes, it got some assets then, if [490] your Honor please.

The Court: That would explain why it had assets and liabilities, as explained in Exhibit "B", attached to Stipulation 1?

Mr. Mackay: That is it, your Honor, yes.

The Court: I see. That clears that up.

Well, then, Pacific Products Company, organized in 1925 as a California Corporation, acquired all of the assets of Seattle Brewing & Malting Company, and one of those assets was the trade name Rainier?

Mr. Mackay: That is right, your Honor.

The Court: And it later, in 1932, must have decided to operate under the name of Rainier Brewing Company, Inc.?

(Testimony of Joseph Goldie.)

Mr. Mackay: Well, there was another reorganization in 1932.

The Court: Did new interests come in then?

Mr. Mackay: Yes, a new corporation was organized.

Mr. Bennion: Paragraph 2 (handing document to Mr. Mackay).

The Court: Now, this witness, then, to get back to this witness' testimony, which we have had to interrupt, Mr. Goldie, was one of the organizers of Pacific Products Company?

Mr. Mackay: Yes, your Honor.

The Court: And purchased stock of Seattle Brewing [491] & Malting Company to the extent of 12,500 shares.

And then, I think, at this point, even if it is a little repetitious, I would like you to clear up where Mr. Goldie comes into the picture in the organization of the Rainier Brewing Company, Inc., organized in 1932, because he has a continuing interest as a stockholder, he and his family appear to have their interest in the Pacific Products Company into their interest in Rainier Brewing Company, Inc.

Mr. Mackay: If your Honor please, if I can call your attention to the stipulation, "In 1932 Pacific Products Company transferred to Rainier Brewing Company, Inc., a California corporation, organized in 1932, its assets of every kind and description, save and except certain designated assets not used in the conduct of its manufacturing business."

(Testimony of Joseph Goldie.)

The Court: Let me see that.

Mr. Mackay: Stipulation No. 1 (handing document).

The Court: All right. Well, I am finished now with this line of inquiry.

Mr. Mackay: That is all, Mr. Goldie.

The Court: Wait a minute! He may have some cross-examination.

Mr. Neblett: No further cross-examination.

Mr. Mackay: Just a minute. I beg your pardon.

The Court: Wait a minute.

Mr. Mackay: Do you mind, Mr. Neblett? [492]

Mr. Neblett: Go right ahead, Mr. Mackay.

By Mr. Mackay:

Q. I will ask you to please examine this statement I hand you and tell me what it is.

A. (Handing document): This is an annual statement of the Rainier Brewing Company, California, December 31, 1940.

Mr. Mackay: If your Honor please, I should like to offer this in evidence as the annual statement of the Rainier Brewing Company for the year ending 1940.

The Court: Without objection, that is received as Exhibit 34.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 34.)

[Petitioner's Exhibit No. 34 appears in Book of Exhibits.]

(Testimony of Joseph Goldie.)

Mr. Mackay: I think that is all, Mr. Goldie.

The Witness: Thank you.

(Witness excused.)

The Court: How about giving the Reporter a rest?

(Short recess.)

Mr. Mackay: Now, if your Honor please, I have here two reports of Dun & Bradstreet, one for the Seattle Brewing & Malting Company, and it is dated August 14, 1941, and one for Rainier, August 26, 1940. And I will state that these were obtained from the Anglo-California Bank, and that if the Bank were here they would testify that they [493] were turned over to the Rainier Brewing Company.

I understand counsel has no objection from that standpoint.

Mr. Neblett: If your Honor please, we object to the substance of these reports. We have no objection to the fact that they were put out by Dun & Bradstreet.

The Court: Yes, I see.

Mr. Neblett: They appear on their stationery which, I think, are authentic and trustworthy, but we object to the substance of the reports.

The Court: Why do you object to the substance?

Mr. Neblett: Could I have a copy of it, Mr. Mackay?

Mr. Mackay? I beg your pardon. Didn't I give you a copy? I think I did yesterday, but I will give you another one (handing document).

Mr. Neblett: If your Honor please, respondent objects generally to the report on account of its content and because it is incompetent, irrelevant and immaterial, and, secondly,——

The Court (Interposing): It is what?

Mr. Neblett: Incompetent, irrelevant and immaterial. And, secondly, we desire to object specifically to the report because the report of Seattle Brewing —the exhibit shows, the proposed exhibit shows on the next to the last page—I am quoting from it, your Honor—"In 1940 an addition to the company's main bottling and shipping plant costing [494] $100,000 was completed. At the same time rights to the use of the former brand name of Rainier beer in Washington and Alaska previously utilized on a royalty basis were purchased for $1,000,000, paying part cash, with the balance due in five years. Additional capital stock was sold, with the proceeds of $600,292.50 and premiums being used to finance a portion of the purchase of the Rainier rights, and the rest added to working funds."

Now, if your Honor please, we seriously object to the conclusional word "purchase" stated in this proposed exhibit.

As your Honor knows, it is our theory in this case that no sale of name occurred and, therefore, no purchase could have been made. We are proceeding down here on the theory that this was a mere license, and these amounts received were advanced royalties.

On that ground, your Honor, we think the conclusional term "purchase" is prejudicial to respondent's position in this case, and we object to the exhibit on that ground.

Mr. Mackay: If your Honor please, if I may be heard for just a moment. We are offering this to show a characterization of the contract which was given to financial houses upon which they—as your Honor well knows, Dun & Bradstreet—upon which reports credit is given.

The rules of evidence, in my opinion, are that as to [495] those things they are admissible. There is one rule of law, I think, that is pretty well established, that you can show by testimony for the purpose of showing the characterization of a contract, or interpretation the parties have given to that contract.

Now, I will grant you, your Honor, it is not offered to be conclusive upon your Honor at all. Your Honor must determine whether this is a sale or whether it is not. But it seems to me the most effective way any Court can determine what a con tract is. And the Supreme Court has said (I think I am quoting almost the language), "Show me what the parties have done under a contract and how they have characterized it and I will tell you what they meant by it."

And I have some authority, if your Honor please, on that.

I am reading from Jones on Evidence:

"When declarations or acts accompany the

fact in controversy and tend to illustrate it or explain it, they are treated, not as hearsay, but as original evidence, in other words, as part of the res gestae.

"It is not a condition of the admission of such evidence that no other can be obtained. The declarations are admitted when they appear to have been made under the immediate influence of some principal transaction, relevant to the issue, and are so connected with it as to characterize [496] or explain it.

"It is hardly necessary to add that when the declarations form part of a contract or the performance of a contract they are relevant and will be received."

The Court: What paragraph are you reading from?

Mr. Mackay: 344. And then I read from Section 582:

"It is hardly necessary to cite authorities to the proposition that, as a general rule, newspapers are not admissible as evidence of the facts stated therein. But when proof is made that one has usually read——"

That is not important.

"And when it is shown that a person is the author of or otherwise responsible for statements or advertisements, they may, of course, be used against him."

Now, our position is, if your Honor please, that in both of these instruments I have heretofore

offered, Dun & Bradstreet,—and I may call your Honor's attention to the Rainier, which I shall hand you now, and which is August 26, 1940.

And I call your Honor's attention to the—I think it is the bottom of the page, where it is stated: "Available information is to the effect that operating results during 1940 have continued the 1939 trend with both sales and earnings running ahead of the previous year. An additional [497] favorable development has been the exercising by the Seattle Brewing & Malting Co. of its option to purchase outright the rights to use the name of Rainier in the Pacific Northwest."

I call your Honor's attention to that because we find here in reports given to Dun & Bradstreet both companies, both parties to this contract characterized it as such. And Rainier did it here, I mean in this report on August 26, 1924, just immediately after the transaction, as late as 1941.

We are offering it, if your Honor please, merely to show the characterization on the part of these two contracting parties.

And may I say this, if your Honor please: I think the Rainier Brewing Company has been somewhat handicapped. We did not know the trial was going on up there. There has been some evidence on cross-examination of Mr. Humphrey read out of a transcript there to test his credibility, which, I think, probably was proper. But, if your Honor will recall, Mr. Neblett asked Mr. Humphrey in substance, "Didn't you tell Mr. Allen and the negotiators when they came down that you said, 'Well, are you here

to make a purchase again?' " In another instance it was to the effect that Allen had testified that there was not to be a sale.

Now, those statements are absolutely contrary to this characterization. [498]

Now, the Commissioner of Internal Revenue—we have never objected, and he has the right to take inconsistent positions, but, if your Honor please, those inconsistent positions must be inconsistent positions on a point of law. Justice would be denied if the Commissioner of Internal Revenue, through some technical objection, denied this Court the right to see all the evidence, and particularly the characterizations as given to it by both parties to the contract.

I have another exhibit here that I am going to offer in a minute. I shall come to that. But it does seem to me, if your Honor please, that where an outfit like Dun & Bradstreet gets its information, a bank gets it, gets this information and it extends credit based upon that, and throughout the financial world, those people who are interested in the contract and in what they are doing, it seems to me, if your Honor please, that it is admissible.

Now, it goes to the weight of it, your Honor. I understand your Honor is well able to determine the weight of it. We don't have a jury here. You don't have to have those strict rules of evidence on it.

The Court: That is right.

Mr. Mackay: And it seems to me that counsel's objection is entirely out of order.

Mr. Neblett: If your Honor please,—— [499]

The Court (Interposing): The objection is overruled. The offers are received.

The Dun & Bradstreet report of August 26, 1940, is received as Petitioner's Exhibit No. 35.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 35.)

[Petitioner's Exhibit No. 35 appears in Book of Exhibits.]

The Court: And the Dun & Bradstreet report dated August 14, 1941, is received as Exhibit 36.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 36.)

[Petitioner's Exhibit No. 36 appears in Book of Exhibits.]

Mr. Mackay: Now, if your Honor please, I have another matter that I should like to call your Honor's attention to, and I started yesterday, and I was out of order. Mr. Humphrey had alluded to it. I want to show you——

The Court (Interposing): Well, I just want to say that we were running so close to the end of the day.

Mr. Mackay: Yes, your Honor, that is quite all right. I have no objection to that.

The Court: I knew if we started in on a problem of exhibits that we would be here until six, and I thought we all wanted to leave.

Mr. Mackay: That was quite agreeable. It was not necessary to keep you here.

Now, I want to call your Honor's attention to the Post Intelligencer, the 12th day of April, 1940, under its [500] Financial Editor, Mr. Fred Neindorff, and he said:

"A special meeting of Seattle Brewing & Malting Company stockholders will be held in the next two weeks to exercise the company's option on the purchase of all rights connected with its manufacture and distribution of Rainier beer.

"Plans for the special meeting were outlined at the annual meeting by Emil G. Sick, President, it was announced yesterday following the annual meeting.

"It was reported Seattle Brewing & Malting Company is entertaining alternative plans:

"1. To make an outright cash purchase for $1,000,000 (the amount it would cost to exercise the option) or

"2. To give Rainier Brewing Company five unsecured notes for $200,000, each maturing annually, but each carrying the provision that payment may be made 'on or before' maturity date.

"In a statement issued yesterday Sick commented:

"'The Century Brewing Company built and equipped the Century Brewing Company in 1933 and 1934.'

"In April of 1935 the Century Brewing Company purchased the old Rainier plant at Georgetown and

likewise took over the business of the Rainier Brewing Company of San Francisco in the State of Washington and [501] Alaska.

"In this merger Century Brewing Company took over the old Seattle Brewing & Malting Company. A contract was made with the Rainier Brewing Company of San Francisco to pay Rainier a minimum of $75,000 a year and a certain extra amount of barrelage of over 100,000.

"This payment was to extend for five years and currently run around 100,000 a year. Under the contract the Seattle Brewing & Malting Company is now privileged at the end of the fifth year to make outright purchase for $1,000,000.

"Financing plans to carry out the deal contemplate issuance of new stock to shareholders of Seattle Brewing & Malting Company on terms described by Sick as 'very reasonable.' "

Now, if your Honor please, I should like to offer that in evidence. I think it is competent.

Let me call your Honor's attention to the fact that that is on April 12, 1940, just before the option, just before this important transaction was to be consummated, before they were to exercise their option, and he comes there and he tells the world. And I can show your Honor it is published in the San Francisco papers as well as this, and also in another magazine.

Here is the Brewery Magazine in that same month, [502] containing exactly the same statement, and I hand it to your Honor.

It is not just the garbled words of a reporter, it

is an issued statement, and they are pleading to the citizens of Washington to help them acquire by outright purchase that business, that name, if you will come here and buy this stock, they are putting it out. It is so public, it is so historic that to deny its admission I think would be a grave injustice.

Mr. Neblett: Please, may be be heard on the question?

The Court: Yes.

Mr. Neblett: If your Honor please, in addressing myself to this legal point I want to point out that Mr. Mackay has cited certain authorities which are in no way applicable to the situation here. This is not a characterization by the parties. This is a characterization of what occurred by a newspaper company. We don't have the newspaper party who wrote this article here. We don't know how he got his information. And, as we all know, newspapers get a lot of information wrong.

The same objection to this proposed exhibit goes to the other exhibit. The Dun & Bradstreet reports are not a classification by the parties. They are the classification by Dun & Bradstreet. We don't know what information Dun & [503] Bradstreet had with respect to construing this contract.

Your Honor's position right now is to construe this contract, and, your Honor, when lawyers are having a very difficult time doing it, I assume, your Honor, that a newspaperman is in no better position to do it than we are.

Now, your Honor points up the defect in this type of testimony. It can be so misleading. It is

a conclusional term. And the objection I make to this type of testimony is bound to be sound in that it is a classification by a party who had no access to the contract. And if he had access to the contract he might have been mistaken in his interpretation of whether this contract was a purchase and sale agreement or a lease.

Based on those specific grounds, your Honor, the respondent objects to the introduction of evidence of this character into the record.

Mr. Mackay: I would like to make this observation: For a long time it was not permitted even to put in market reports or anything else into evidence, but finally, because of trying to arrive at justice, the Courts did not stay bound by the rules. They extended a little bit as all these rules have developed, for one purpose, to find out the real facts.

And this is what one Court says with respect to financial matters: [504]

> "As a matter of fact, such reports, which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and Courts would justly be the subject of ridicule, if they should deliberately shut their eyes to the source of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

The Court: Well, that has reference to market quotations.

Mr. Mackay: I appreciate it has, but I am thinking of these other financial reports upon which people rely, especially those from Dun & Bradstreet.

But it does seem to me, if Your Honor please, the Commissioner of Internal Revenue, if finding that case, if our interests had been protected, if that article there had been presented to the Tax Court, that testimony that he referred to here, and tried to upset Mr. Humphrey's testimony, would have been completely repudiated.

Now, it is entirely up to Your Honor, it is well within your discretion. As I say, it goes to the weight of it. It is not conclusive, Your Honor. It is certainly, in my opinion, a very important part of this case. I can't see [505] why the Commissioner of Internal Revenue, if he has taken a neutral position here, as we have heard so many times, and if he wants to be consistent, let him get the facts here on that.

The Court: Well, now, am I correct in understanding that the report in the Seattle Post Intelligencer on April 12, 1940, by Mr. Fred Niendorff, contains a statement issued by Mr. Emil G. Sick?

Mr. Mackay: Yes, Your Honor.

The Court: It appears from the clipping from the newspaper that the reporter has made it perfectly clear that Mr. Sick issued the following statement. Now, Mr. Sick was the President, as I understand it, of the Century Brewing Company, which was a party to the contract that was executed

in 1935, and which is Exhibit 1 in this proceeding.

Mr. Mackay: That is right.

The Court: May I see Exhibit 1, please?

(Document was handed to the Court.)

The Court: That contract was executed April 23, 1935, was signed by Emil Sick as Vice-President of the Century Brewing Association, and that Association is designated as "the party of the second part" to this contract. Therefore, a statement by Mr. Sick, assuming that his quotation has been accurately reported, represents a statement by a party to the contract. [506]

Mr. Mackay: That is right.

The Court: It happens that in this proceeding that is a statement by the other party to the contract, that is, other than the petitioner in this proceeding which was designated as the party of the first part in that contract.

It, therefore, seems to me that the answer to this problem that is raised is to be found in the rule that evidence is admissible of the interpretation of a contract given by one of the parties to the contract.

Mr. Mackay: That is right.

The Court: The objection would be whether this is the best evidence.

Mr. Mackay: Yes.

The Court: Of that interpretation?

Mr. Mackay: Yes.

The Court: And then I think we should go to the point of whether this is the best evidence.

Mr. Mackay: I think that is so.

The Court: On that point you have here some cumulative evidence. The same statement of Mr. Sick is quoted in the Brewer & Dispenser of April, 1940.

Mr. Mackay: Yes.

The Court: Now, in that connection—and I expect that you intend also offering this issue of the Brewer & Dispenser of April, 1940, for the quotation of page 8, is [507] that correct?

Mr. Mackay: Yes, Your Honor. I have a photostat copy.

The Court: Now, we have to remember that a magazine must be prepared for publication, perhaps, several weeks before the date of the publication, that is, the April issue of the Brewer & Dispenser would have to be prepared during March. It might come out shortly before the first of April, and that would indicate that the quotation appearing in the Brewer & Dispenser must have been issued, assuming that Mr. Sick issued to the press a prepared statement prior to April 12, 1940. That gives us a perspective on the newspaper clipping that is offered from the Post Intelligencer for April 12, 1940.

Now, what other evidence have you that would support your contention that this offer does not come within the exclusions of the best evidence rule?

Mr. Mackay: I have a photostat copy of the Examiner of San Francisco on April 13th, if Your Honor please. It is small print, I am sorry.

Mr. Neblett: Mr. Mackay, could we have a copy?

Mr. Mackay: Yes.

The Court: Do you have any statements issued to stockholders relating to the matters to be covered at the meeting of the stockholders that was to be held to settle [508] this problem?

Mr. Mackay: No, Your Honor. We have had no access to that at all in Seattle. This is with respect to Rainier. Rainier would say that same thing at the annual meeting of the stockholders. It is the last exhibit I put in.

The Court: May I see that?

(The document was handed to the Court.)

Mr. Mackay: For Seattle, Your Honor.

The Court: Exhibit 34 is the printed annual statement for the year ended December 31, 1940, of the Rainier Brewing Company, and that reports to the stockholders the receipt of the notes for $1,000,000, and that is characterized as a receipt of $1,000,000 in consideration for sale of certain intangible assets.

Have you any notice to the stockholders issued prior to the meeting? Was there any meeting of the stockholders held or not?

Mr. Mackay: Was there any meeting held prior to——

The Court (Interposing): Of the Rainier Brewing Company?

Mr. Mackay: There was no other statement issued prior to this time. This was the only issue, was it, Mr. Smith?

Mr. Smith: There was only one issue, yes, and this is the annual statement. [509]

The Court: Did the stockholders have to approve the acceptance of the notes?

Mr. Smith: No, Your Honor. It was approved by the Board of Directors.

The Court: Well, it was approved by the Board of Directors.

Do you have a minutes of a meeting of the Board of Directors approving the receipt of the notes under the contract?

Mr. Mackay: We can check that up, Your Honor, at noon time. I am not sure it was—we will check that.

Mr. Smith: Yes.

Mr. Neblett: I think we have something on that, Your Honor.

The Court: I think that the matter ought to be explored a little bit.

Let me say this: I would like to have the best evidence produced, and I think there would be less question, and probably there is very little question about the propriety of receiving in evidence the financial journal reports which you have offered, but doubt upon that would be removed by having some of the corporate records of this party.

Mr. Mackay: Yes, we will be very glad to do that.

The Court: To the agreement.

And so, with that understanding, and I am not [510] indicating one way or the other what the ruling should be on this, but I would say that you might as well re-offer these at the time if you find any minutes of a meeting of the Board of Direc-

tors that would show what the corporate action was at this time.

Mr. Mackay: All right, Your Honor.

The Court: I understand that the corporate action to be taken by the Century Association would, of course, be different than the corporate action to be taken by the Rainier Brewing Company.

Mr. Mackay: Yes.

The Court: And that you are at a disadvantage at being unable to offer records of the other corporation, the other party to the contract.

Mr. Neblett: I have those records here, Your Honor.

The Court: At the same time that obstacle should not stand in the way of your right to show as best you can what interpretation was placed upon the contract by the other party to the contract.

Mr. Mackay: That is right.

The Court: And during the recess, then, I will ask you to look further into the record.

Mr. Mackay: Yes, your Honor.

The Court: Now, is there anything further from the [511] Petitioner?

Mr. Mackay: I have in my hand, if Your Honor please, a statement entitled "Net income for the Years Ended June 30, 1908 to 1915, inclusive, of the Seattle Brewing & Malting Company," which Mr. Sonnenberg, who is in Court, has stated has been made from the records of the company.

I understand there is no objection.

Mr. Neblett: No objection.

The Court: Without objection, that is received as Exhibit 37.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 37.)

[Petitioner's Exhibit No. 37 appears in Book of Exhibits.]

Mr. Mackay: If Your Honor please, except with respect to these exhibits, we shall later offer, that is all the petitioner has.

The Court: Now, what is the respondent's case?

Mr. Neblett: May we proceed, then, Your Honor?

The Court: What I meant to say is, are you going to call witnesses?

Mr. Neblett: Just one minute, Your Honor. Let me consult with my associate.

If Your Honor please, we have quite a few documents to go in evidence, but other than that the respondent will not have any witnesses.

The Court: All right, then, will you proceed to [512] offer your exhibit?

I am going to take a recess for just a minute, please, and you organize those exhibits that you have to offer. You have a good many that were marked for identification. As a matter of fact, I don't think respondent—has respondent any exhibits in?

The Clerk: No.

The Court: They were marked for identification from "A" to "H."

(Short recess.)

The Court: The respondent has some exhibits

to offer and it will take a fair amount of time for respondent to offer those exhibits. It is 12:30 and this is the time we ordinarily recess for lunch. Also the petitioner has made an offer of some exhibits so we have a certain amount now to take care of in the matter of these exhibits.

I would just like to say that I hope you all understand that we are not rushed for time. I allowed the full day for the trial of the case. I want you to understand that we can go on just as long as you want to today, and I am sure we will be able to conclude the hearing today.

I understand, Mr. Neblett, that you had an expert witness, and if you care to call that witness there is no limitation on the time that you can be given, and, perhaps, calling the witness would be helpful to the Court. [513]

We will recess until 2:00 o'clock.

(Whereupon, at 1:30 p.m. a recess was taken until 2:00 p.m. of the same day.) [514]

Afternoon Session, 2:00 P.M.

Mr. Mackay: If your Honor please, we have obtained the certified copy of the minutes that you asked for of the Rainier Brewing Company. I have given counsel a copy, and I should like very much to furnish a copy for the Court, to introduce in evidence.

The Court: Now, what do these minutes show, briefly? Anything we are interested in?

Mr. Mackay: Yes, your Honor. We have the

call of the meeting, and it relates to the $1,000,000.

The Court: Any objection?

Mr. Neblett: No objection, your Honor.

The Court: Petitioner's Exhibit 38.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 38.)

[Petitioner's Exhibit No. 38 appears in Book of Exhibits.]

Mr. Mackay: Now, if your Honor please, I would like to make a formal offer of the——

The Court (Interposing): Are you going to offer that or the photostat?

Mr. Mackay: I think I have a photostat. Well, we can offer this, your Honor. We have the photostat.

The Court: The objection has been made. I am going to receive that for what it is worth.

All right, received as Exhibit 39.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 39.) [515]

[Petitioner's Exhibit No. 39 appears in Book of Exhibits.]

Mr. Mackay: And I should like also, if your Honor please, to offer an article on Page 8 of the Brewer and Dispenser, dated April, 1940.

The Court: And that is subject to the same objection.

I am receiving that with the same statement. These are received. There is some limitation on

the value of these offers, but they are evidence of what has appeared in the press, presumably as authorized statements of Mr. Sick. Received as Exhibit 40.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 40.)

[Petitioner's Exhibit No. 40 appears in Book of Exhibits.]

Mr. Mackay: And I should like to offer in evidence a photostatic copy of the Examiner of San Francisco, April 13, 1940.

The Court: Now, that doesn't have a direct quotation, does it?

Mr. Mackay: No, your Honor.

The Court: I think objection to that type of evidence is sustained in that instance.

Mr. Mackay: O.K. That is all, your Honor.

The Court: That concludes the Petitioner's case?

Mr. Mackay: Yes, your Honor.

May I make this request? That I have this photostated, [516] the Brewer and Dispenser, and substitute it?

The Court: Yes, a photostatic copy may be substituted for Exhibit 40.

Mr. Mackay: Yes.

The Court: Mr. Neblett?

Mr. Neblett: May we proceed, your Honor?

The Court: Yes.

Mr. Neblett: If your Honor please, at this time

Respondent offers in evidence his exhibits for identification "A" to "H," inclusive.

The Court: Now, have you photostats of those?

Mr. Neblett: And asks the privilege to withdraw these exhibits and substitute photostats.

The Court: Any objection?

Mr. Neblett: We will furnish a copy to opposing counsel.

The Court: Is there any objection?

Mr. Mackay: I have no objection, your Honor, except that we have some marks in there. We want one or two more pages to go in.

Mr. Neblett: If you will show me what you would like marked.

The Court: I wish you had done that during the recess. You were waiting for me to come back. That should have been done. You will have to do that later. [517]

Mr. Mackay: All right.

The Court: Mr. Neblett, let Mr. Mackay see the books. Maybe, he can find the pages he wants in the other books.

Mr. Neblett: All right. If your Honor please, at this time Respondent——

The Court (Interposing): In general, Mr. Mackay, is there any objection to these quotations from these books?

Mr. Mackay: No, your Honor, I have no objection to them.

The Court: All right.

Mr. Neblett: Do you want me to introduce them one at a time?

The Court: No. Exhibits marked for identification as "A" to "H," inclusive, are received in evidence, and substitute photostat copies of the pages may be substituted.

(The documents referred to, heretofore marked as Respondent's Exhibits "A" to "H," inclusive, for identification, were received in evidence as Respondent's Exhibits "A" to "H.")

[Respondent's Exhibits "A" to "H" appear in Book of Exhibits.]

The Court: And it is understood that counsel for Petitioner will indicate to Mr. Neblett what other pages he wants to have included in these exhibits. Now, on that point, if Mr. Neblett doesn't agree, and doesn't want to have extra pages of the parts of his exhibits, then I suggest that you have some of these pages offered as your own exhibits.

Mr. Mackay: Yes, your Honor.

The Court: That can be worked out between you at the conclusion of the hearing.

Mr. Neblett: If your Honor please, we want to read into the record at this time a few excerpts from a protest submitted to us by John F. Forbes & Company. Mr. Forbes was on the stand yesterday.

Mr. Mackay: May I see it?

The Court: A protest?

Mr. Neblett: It is dated October 15, 1942, in connection with this case.

The Court: What is the purpose of that?

Mr. Mackay: It has some declaration of interest

and some matters which support our theory in this case.

The Court: I see.

Mr. Mackay: Mr. Neblett, may I inquire, I see that this appears to be an original, but I don't see the signed,—are you correct when you say it is a protest?

Mr. Neblett: Well, I will tell you what it is.

Mr. Mackay: Have you got a copy of it? Was it signed, or anything like that? That is what I am trying to find out just for information. I just wanted to know.

Mr. Neblett: No, I don't think—all I know about it is that it is on the stationery of Forbes and Company.

Mr. Mackay: We are not denying that. I am just [519] trying to find out if that is really a protest. You designated it as a protest.

Mr. Neblett: I wouldn't like to call it a protest; to be exactly accurate, it is a communication.

The Court: Why don't you call it a communication?

Mr. Neblett: It is a communication from Mr. Forbes on the stationery of John F. Forbes and Company.

The Court: Do you want to offer the whole thing?

Mr. Neblett: No, your Honor.

Mr. Mackay: Why not?

Mr. Neblett: I want to read it into the record. If Mr. Mackay wants to offer the whole thing we would have no objection, your Honor.

As we understand the rule, if we read part of it he can ask that the rest go in if he cares to do so.

The Court: All right.

Mr. Mackay: I think, if you read it, the whole thing ought to go in.

Mr. Neblett: I am just going to read certain excerpts. If you want to put the balance in you can have that privilege.

The Court: All right, Mr. Neblett, will you proceed.

Mr. Neblett: "The first step in determining the goodwill value of the name Rainier Beer is to calculate the [520] goodwill value of the company manufacturing and distributing this product. This total figure will be a composite of (a), the goodwill of the trade name Rainier Beer insofar as that contributes to the profitability of the company, and, (b), all other goodwill elements enjoyed by the company.

"2. The second step in determining the goodwill value of the trade name Rainier Beer is to eliminate from the figure $1,206,213.36, just calculated, all contributions to the excess profits of the Seattle Brewing and Malting Company made by factors other than the trade name Rainier Beer. The remainder will be the goodwill value of the trade name to the extent that that was reflected in the excess earnings of the company."

Continuing to read:

"The advertising policy of a manufacturing company is only one factor contributing to its goodwill.

In this case only the good name of the product benefitted by advertising.

"Other factors listed in accounting treatises which should be considered in determining the company's separate goodwill are: (a) The company's reputation for honesty and fair dealing; (b) the unusual devotion of both management and employees to the best interests of the customers; (c) The enjoyment of a monopoly position in the trade, and, (d) The occupation of particularly advantageously placed business premises." [521]

"There is no doubt as to the integrity of the Seattle Brewing and Malting Company, its officers and employees. The question is to what extent this could be treated as a business asset. The morales in trade of the management could be expected to have little influence on retail purchases of beer, but under normal circumstances might greatly affect wholesale distribution.

"The situation which prevailed in Washington in 1913 and previous years was unusual and operated to nullify this influence. In Washington beer was distributed through a licensing system under which the brewer would set up the saloon, or acquire the license of a saloon, and the captive saloon would then dispose of only the beer of the licensed holding brewery."

Skipping over some.

"As indicated above, no amount of esprit de corps and readiness to perform special services for wholesale purposes by officers of the Seattle Brewing and Malting Company would have any great influence

on the company's dealings with its captive outlets. The latter were committed by self interests to push the sales of the company's product."

"It has already been pointed out that the liquor business in Washington was highly competitive. In heavy beer consuming sections there might be saloons on all four corners of a given street intersection, each selling the beer [522] of its licensed holder."

Your Honor referred to that in some of your questions.

"The advantage enjoyed by the saloons selling Rainier beer were not one of location, as noted above, of possessing the exclusive right to sell Rainier beer. There is no suggestion in the foregoing analysis that the value of the Seattle Brewing and Malting Company, divorced from the trade name of its product, would have sunk to the salvage value of the plant."

That is quite interesting there, your Honor, so interesting I would like to repeat.

"There is no suggestion in the foregoing analysis that the value of the Seattle Brewing and Malting Company, divorced from the trade name of its product, would have sunk to the salvage value of the plant. On no account need this have followed.

"The calculations shown in Section 1 above are predicated on the assumption that the given management and plant could have continued indefinitely to earn a very succesful return of 8 per cent on the investment in intangible assets."

And continuing further: "No formula exists to

measure the value of this aspect of trade name and good will. Its monetary value can only be determined at the time of the [523] sale by the operation of the respective bargaining power of buyer and seller, and even then extraneous factors tend to enter. This element of good will value can very easily persist even if there were no excess profits, and might still conceivably obtain if the company were operating at a loss."

That, your Honor, is as much as we care to read in this document.

The Court: What is the date of the document?

Mr. Neblett: The document is dated October 15, 1942.

The Court: Is there a forwarding letter attached to the document?

Mr. Neblett: Yes, your Honor, there was a forwarding letter.

The Court: What did that forwarding letter say?

Mr. Neblett: Now, let's see here. We have got two of them, your Honor. Let me see the other one.

Your Honor, I have two of these, and I have got a forwarding letter dated January 26, 1943. Just a minute. Let us check into that.

Your Honor, the forwarding letter is dated January 26, '43. If this is a proper forwarding letter—we got two of these memorandums. Now, the memorandum is dated San Francisco, October 15, '42, and the forwarding letter is dated January 26, 1943. Apparently, they wrote it [524] up some

time back and then forwarded it to us later.

The forwarding letter states: "Dear Mr. Clack——

The Court: Who is Mr. Clack?

Mr. Neblett: Mr. Clack is our engineer, he is the gentleman sitting right over there, your Honor (indicating).

"Mr. James F. Clack,

Internal Revenue Agent,
74 New Montgomery Street,
San Francisco.

Dear Mr. Clack:

"In re Rainier Brewing Company.

"We enclose copy of a memorandum relating to the March 1, 1913, value of the trade name Rainier applicable to the State of Washington, Territory of Alaska.

"Yours very truly,

John F. Forbes Company."

And the letterhead has down on the left-hand side, the bottom, the word "enclosure," and it is on the stationery of John F. Forbes and Company, Certified Public Accountants.

Mr. Mackay: Let me just take a look at that.

Mr. Neblett: Now, if Mr. Mackay cares to introduce the rest of the document we have no objection, your Honor.

The Court: All right. Now, what next? [525]

Mr. Mackay: You may proceed.

Mr. Neblett: All right. If your Honor please, at this time Respondent offers in evidence a certified copy entitled "United States of America, State of Washington——"

The Court: (Interposing) Is that the certificate about the enactment of the prohibition law?

Mr. Neblett: Yes, November 3, 1914.

Mr. Mackay: Oh, there is no objection to that.

The Court: All right, received as Exhibit "I".

(The document referred was marked and received in evidence as Respondent's Exhibit "I".)

[Respondent's Exhibit "I" appears in Book of Exhibits.]

Mr. Neblett: Your Honor, we have spoken about captive saloons and the ones that were owned by Seattle Brewing and Malting Company in the State of Washington.

I offer in evidence a schedule showing such saloons owned by Seattle Brewing and Malting Company from 1908 to 1913 in the State of Washington.

The Court: Any objection?

Mr. Mackay: No objection, your Honor.

The Court: Received as Exhibit "J".

(The document referred to was marked and received in evidence as Respondent's Exhibit "J".)

[Respondent's Exhibit "J" appears in Book of Exhibits.]

Mr. Neblett: If your Honor please, Respondent

asks that there be received in evidence the income tax return of the Seattle Brewing and Malting Company for the year ended [526] December 31, 1915.

The Court: What is the purpose of that?

Mr. Neblett: It shows that this company suffered a loss in that year.

The Court: Without objection that is received as Exhibit "K" with leave to substitute a photostat copy.

(The document referred to was marked and received in evidence as Respondent's Exhibit "K".)

[Respondent's Exhibit "K" appears in Book of Exhibits.]

Mr. Neblett: If your Honor please, Respondent asks there be received in evidence a letter on the stationery of Seattle Brewing and Malting Company, dated September 29, 1916, where they claim a large loss for abandonment of their brewery plant. Mr. Mackay has been furnished with a copy.

Mr. Mackay: Have I? Well, there is certainly no objection to that.

The Court: Received as Exhibit "L".

(The document referred to was marked and received in evidence as Respondent's Exhibit "L".)

[Respondent's Exhibit "L" appears in Book of Exhibits.]

The Court: I am not going to keep on saying

that you can substitute photostat copies. That should be understood.

Mr. Neblett: Yes, that is very fine.

Mr. Mackay, if it develops that you don't have a copy you are very welcome to it.

Mr. Mackay: Thank you kindly.

Mr. Neblett: Or any other document that we have. [527]

If your Honor please, I want to indicate at this time that a claim for abatement is attached to the return of Seattle Brewing and Malting Company for the year ended December 31, 1915.

Respondent offers in evidence the corporate return of Seattle Brewing and Malting Company for the year ended December 31, 1916, which shows a loss.

Mr. Mackay: No objection.

The Court: Received as Exhibit "M".

(The document referred to was marked and received in evidence as Respondent's Exhibit "M".)

[Respondent's Exhibit "M" appears in Book of Exhibits.]

Mr. Neblett: Respondent offers in evidence the corporate return of Seattle Brewing and Malting Company, West Virginia corporation, for the year 1917, which return shows a gain, your Honor.

Mr. Mackay: No objection.

The Court: Shows a gain?

Mr. Neblett: A gain.

The Court: Received in evidence as Exhibit "N".

(The document referred to was marked and received in evidence as Respondent's Exhibit "N".)

[Respondent's Exhibit "N" appears in Book of Exhibits.]

Mr. Neblett: If your Honor please, these are older returns, and we can't figure them quite as rapidly as we can the newer returns.

Respondent asks that the corporate income and profits tax return for Seattle Brewing and Malting Company for the calendar year 1918 be received in evidence.

Mr. Mackay: No objection.

The Court: Received as Exhibit "O".

(The document referred to was marked and received in evidence as Respondent's Exhibit "O".)

[Respondent's Exhibit "O" appears in Book of Exhibits.]

Mr. Neblett: That return shows a loss.

Respondent asks that the corporate income and profits tax return for 1919 be received in evidence, your Honor.

Mr. Mackay: No objection.

The Court: Received as Exhibit "P".

(The document referred to was marked and received in evidence as Respondent's Exhibit "P".)

[Respondent's Exhibit "P" appears in Book of Exhibits.]

Mr. Neblett: Respondent asks that there be

received in evidence Seattle Brewing and Malting Company corporation income and profits tax return for the calendar year 1921.

Mr. Mackay: Still no objection.

The Court: Received as Exhibit "Q".

(The document referred to was marked and received in evidence as Respondent's Exhibit "Q".)

[Respondent's Exhibit "Q" appears in Book of Exhibits.]

Mr. Neblett: Would you indulge me to speak to the opposing counsel a minute?

If your Honor please, we offer in evidence a copy of a letter addressed to Seattle Brewing and Malting Company, West Virginia, showing an obsolescence of good will April, 1918. [529]

Mr. Mackay: No objection.

The Court: (Examining document) Well, what is this?

Mr. Neblett: I have furnished copies to opposing counsel.

That simply means, your Honor—that is in connection with the obsolescence of good will.

The Court: But what is the document? Is it a letter from the Bureau to the Seattle Brewing Company, or what is it?

Mr. Neblett: That is my understanding of it.

Mr. Mackay: That is what I thought you said. That is why I made no objection.

The Court: I don't know what weight to attach to this. It has a lot of initials at the bottom of it.

Mr. Neblett: That is our copy of it, your Honor. The original went to Seattle Brewing and Malting for that period, and it explains——

The Court: (Interposing) No, this is not at all clear.

Is this supposed to be a determination by the Commissioner that they were entitled to receive a deduction for obsolescence of good will? What does it mean? If so, did they receive it? Did they claim it? Did they take it? What is it? I don't know what this is. [530]

Mr. Neblett: Well, I can explain it to you, your Honor. I am simply saying that it involves the tax benefit that we have stipulated they got as of 1918 and 1919. It, to a certain extent, explains that tax.

The Court: What is that stipulation, then, so that I can tie that Exhibit up with the stipulation?

Mr. Neblett: Yes. It is stipulation 3.

The Court: Let me have stipulation 3, please.

(Examining document) Well, I wish you could tie it up with your stipulation. All that I see is that in 1920 Seattle Brewing filed a claim for abatement of taxes, there is an allocation of $400,000 for the years '18, '19 and '20.

Mr. Neblett: If your Honor please, we have decided here that these two letters simply are explanatory of the stipulation, and instead of explaining it they may confuse it. Respondent is willing to stand on the stipulation just like it is.

The Court: What stipulation?

Mr. Neblett: The stipulation No. 3 with respect to the obsolescence allowed.

The Court: Well, then will you point out to me in stipulation No. 3 where there is any reference to obsolescence allowed? Here is stipulation No. 3. I can't find it. [531]

Mr. Neblett: Very well, your Honor.

If your Honor please, the stipulation says:

"Petitioner's predecessors, Seattle Brewing and Malting Company, the West Virginia Corporation, and Rainier Brewing Company, the Washington corporation, filed income tax returns for the years '18, '19 and '20 but claimed no deductions therein for obsolescence of good will,"——

The Court: I don't know why everyone has all of a sudden decided to whisper, so would you all speak up. I have been dropping my voice, but all of a sudden everybody has gotten so quiet.

Mr. Neblett: The stipulation states, your Honor, that "Petitioner's predecessors, Seattle Brewing and Malting Company, the West Virginia corporation, and Rainier Brewing Company, the Washington corporation, filed income tax returns for the years '18, '19 and '20 but claimed no deductions therein for obsolescence of good will or trade name.

"In July, 1920, Seattle Brewing and Malting Company, the West Virginia Corporation, filed a claim for abatement of taxes for the year 1919, a photostatic copy of which is attached hereto, marked Exhibit 1, and made a part hereof. The Commissioner of Internal Revenue thereafter, in 1924, in lieu of the amount of $542,240.27, stated in Schedules "E" and "F" of Exhibit "I" attached hereto, computed an amount of $406,680.20, which was

arrived at by using the same figures [532] as those used in Exhibit "I" attached hereto, but changing the capitalization rate from 15 per cent as used in Exhibit "I" to 20 per cent. The Commissioner allocated said amount of $406,680.20 to the following years in the following amounts: Year 1928——"

The Court: (Interposing) I read all of that. What has that got to with obsolescence of good will? That interests me, that there somewhere is lurking behind all of this a deduction for obsolescence of good will. And I would like to have it made clear that at one time they took a tax deduction and got some benefit for it. That is very important.

Mr. Neblett: Exactly.

The Court: But there is something difficult about this. Now, if you could show me—I don't want to take up a lot of time with this, but it may be that the claim for abatement had something to do with the net result of a lot of deductions, and I don't know what it had do with it.

But what is there in those schedules that points out that a deduction for obsolescence of good will entered into what is set forth on Pages 1 and 2 of that stipulation? Is there anything?

Mr. Neblett: Yes, your Honor. As I understand it——

The Court: (Interposing) Well, can you point it [533] out to me over the desk here? Maybe, I can see it faster than I can listen to it.

(Examining document) Well, let's pass it and have a conference about it later.

Mr. Neblett: Very well, your Honor.

The Court: What other exhibits have you to offer?

Mr. Neblett: It is an involved situation and we will take it up later.

The Court: It must be.

Mr. Neblett: If your Honor please, Respondent offers in evidence at this time the corporation income tax return for the calendar year 1942 of Seattle Brewing and Malting Company.

The Court: What is the purpose, please?

Mr. Neblett: To show their earnings or loss during that period of time.

The Court: What is the purpose of all of these returns showing gains or losses in these background years?

Mr. Neblett: Well, just to show, your Honor, that during that period of time this corporation was not making any money and for that reason the good will was of no practical value, or, for that matter, dead. That is the purpose of it.

Mr. Mackay: Well, then, if your Honor please, if that is the purpose I object on the ground it is incompetent, irrelevant and immaterial, doesn't even show that the [534] value of the good will did not exist. It is not proper evidence.

Mr. Neblett: All right, that is the purpose for which they are offered, your Honor.

Mr. Mackay: I can't see, if your Honor please, how a return would show whether the good will is how much, or any, we have taken an awful lot of time here to try and prove good will. We couldn't do it by a return.

Mr. Neblett: We are not going to take much time, your Honor. We think it shows a history right down to date. We want to bring it right up to date.

The Court: The question has been to determine the fair market value of good will on March 1, 1913, and we know that there was a contract entered into in 1935, and that payment was made in 1941—is that when——

Mr. Mackay: (Interposing) 1940.

The Court: 1940.

Mr. Mackay: Yes, your Honor.

The Court: Now, between 1915 and 1935 why should we be inquiring into the earnings and profits of the business?

Mr. Mackay: I see no reason why we should, your Honor. It has no bearing upon the points here. There is only two points in this case, first the legal question of whether it is a sale, the other, what the fair market value on March 1, [535] 1913, was. It seems to me it is unduly burdening the Court and everyone else to put all these records in. I think they are entirely incompetent, irrelevant and immaterial to the issues of this case.

The Court: There was a change in Washington when the State Prohibition Act was adopted in 1914. Then I understood that they moved the main office to San Francisco, so then I suppose they concentrated on areas outside of the State of Washington.

Mr. Mackay: That is correct.

The Court: They continued in business, and

these returns are returns for the entire business as conducted in these taxable years.

Mr. Neblett: That is right.

The Court: And they haven't anything to do with the business as conducted in the State of Washington?

Mr. Neblett: Well, we are dealing—it is our theory, your Honor, and we hope to show by these returns that this good will was extinguished during that period of time.

The Court: Well, now, if you get together all of the returns and have them in your hand at one time and just tell me that you have the returns for a certain number of years you want to offer—how many more years are you going to offer?

Mr. Neblett: I have them right in my hand here together. [536]

The Court: I would rather have them all at one time.

Mr. Neblett: All right. I didn't understand you wanted them all at one time.

The Court: I think they are immaterial, but I will let them come in for what they are worth, but I don't want to give more than three minutes to receiving some immaterial evidence.

Mr. Neblett: There are quite a few of them, your Honor.

The Court: That is all right, if you just read into the record you have the returns for the years '22, '23, '24, '25, '26, and get it over with.

Mr. Neblett: All right, your Honor.

The Court: Then you have one purpose for

offering all of them, but I am timing you. It takes you at least three minutes to offer each one, to walk from one table over to the next table and hunt around, and whisper to those returns, and pat them on the back, before you come over and put them down on the table, and you have taken such good care of those returns before you give them to me. I just wanted to get it all over with and get it done. It is a painful operation for everybody.

Mr. Neblett: It certainly is.

The Court: And just get through this misery as [537] soon as we can.

Mr. Neblett: If your Honor please, Respondent offers in evidence the returns of Seattle Brewing and Malting Company for '22, '23, '24, '25, '26, '27, (at '27 it becomes the Pacific Products Company) and '28, Pacific Products Company, Inc.; '29, Pacific Products Company, and 1930, Pacific Products Company; and 1931, Pacific Products Company; and 1932, Pacific Products Company.

Respondent offers these returns in evidence.

Mr. Mackay Same objection.

The Court: All right, I will receive them for whatever they are worth and they will be numbered Respondent's Exhibit "R" next order going into the second alphabet to "AA", "BB", and so forth.

Mr. Neblett: If your Honor please, Respondent offers in evidence the Corporation Income Declared Value Profits Return of Rainier Brewing Company for the calendar year 1940, and the Corporation Return of Rainier Brewing Company for the calendar year 1941.

The Court: Those are received in evidence and will be numbered as Respondent's Exhibits next in order.

Mr. Neblett: If your Honor please, Respondent asks that there be received in evidence an extract of the minutes of the regular meeting of the Board of Trustees of Seattle Brewing and Malting Company, held April 10, 1940. [538] Counsel has been furnished a copy of this minute. It pertains to the exercise of the option in this case and is taken from the minutes of the Seattle Brewing and Malting Company's minute book.

Mr. Mackay: Now, if your Honor please, counsel had told me that he meant to put this in the other case, and he told me that he couldn't get a copy in time to come to the Tax Court, so I told him, of course, I wouldn't require that on his statement that a true copy was put in as Exhibit 8 in that other case.

Mr. Neblett: That is right.

Mr. Mackay: I objected to it, however, not on the ground that it isn't properly identified, but on the ground that it doesn't appear to be an action of any Board of Directors or anybody having authority of the Seattle Brewing and Malting Company. It is not a minute of the Board of Directors in any sense of the term.

The Court: Let me see that, please.

Mr. Neblett: Yes, your Honor (handing document).

I can explain, if your Honor cares to have an explanation.

The Court: What was the Board of Trustees of Seattle Brewing and Malting Company?

Mr. Neblett: It was the directors and officers of the Company, your Honor. [539]

It was taken from the minute book.

The Court: Well, it is a meeting of Directors and it is not a meeting of stockholders, so what is it?

Mr. Neblett: As I understand, the Board of Trustees is the ones who are in control of the company.

The Court: Well, it may be a term we are not acquainted with. Do you know what this is?

Mr. Neblett: Yes, your Honor, that is an extract from the minutes of the Seattle Brewing and Malting Company's minute book. That was introduced in evidence as Exhibit 8 in Docket No. 2265.

The Court: Well, how was it described in the transcript of the other case?

Mr. Neblett: In the transcript, Exhibit 8, page 40:

> "Mr. Jones: I offer in evidence as Petitioner's Exhibit No. 8 an extract from or copy of the minutes of the meeting of the Trustees of Seattle Brewing and Malting Company held April 10, 1940.
>
> "Mr. Neblett: No objection, with the understanding I know what it is.
>
> "Mr. Jones: Yes.
>
> "Presiding Officer: It will be received as Petitioner's Exhibit No. 8.
>
> "(The document referred to was marked

and received in evidence as Petitioner's Exhibit No. 8.)" [540]

[Petitioner's Exhibit No. 8 appears in Book of Exhibits.]

The Court: What is the purpose of the offer?

Mr. Neblett: The purpose of the offer, your Honor, is to show how the Seattle Brewing and Malting Company treated this transaction in the minute book.

The Court: Is that what this shows?

Mr. Neblett: I think so. It shows that—I don't have a copy, because your Honor has it.

It says there that the——

The Court (Interposing): Well, it says the President called attention to the contract, and then it says that the volume of the Company's business had been such the annual royalty was now running to $100,000. And it says that "In view of the prospective increase in the Company's business it would seem that it might be advantageous—" to do certain things.

"However, there are some matters connected with the contract which may require negotiation and possibly lead to some amendments. No definite recommendation can be made. It is the sense of the meeting that this course should be adopted, that is, that the whole matter should be left to the officers of the company for further consideration, negotiation and report."

Mr. Mackay: Yes, your Honor.

The Court: "There being no further business the meeting adjourned." [541]

So what does it prove?

Mr. Mackay: There is no corporate action whatever.

The Court: It doesn't prove anything whatever. They had a problem. They said they were going to leave it up to the officers of the company to discuss and negotiate.

Mr. Neblett: It contains this statement, your Honor: "The contract can be terminated at any time without further liability for future royalty payments."

The Court: Well, I can't accept that as proof of anything, Mr. Neblett. I don't care if it was received in evidence in the other case. It is one of these loosely drawn things that represents something of a stenographic report of what was said at a meeting, and I don't know even whose opinion that was, as to what the contract provided. And it doesn't represent any final interpretation of any kind. It is a little statement that is inserted in the minutes of a meeting where nothing was done excepting to refer to a problem and say that it should be left to the officers to negotiate.

Furthermore, I think the point is ambiguous because later on it says there that whatever they were worried about, which isn't very clear, they thought that the contract might have to be amended.

Now, what does that mean?

Mr. Neblett: Very well, your Honor. [542]

The Court: For the record, the returns that

were offered in evidence by the respondent have been marked by the Clerk as Respondent's Exhibits "R" to "DD" inclusive.

(The documents referred to were marked and received in evidence as Respondents Exhibits "R" to "Z" and "AA" to "DD" inclusive.)

[Respondent's Exhibits "R" to "Z" and "AA" to "DD" appear in Book of Exhibits.]

Mr. Neblett: If your Honor please, I would like to ask Mr. Mackay at this time: Yesterday, we questioned Mr. Forbes about certain bills receivable in one of your exhibits.

Were you able to produce that information, Mr. Mackay?

Mr. Mackay: I understand that we were not, Mr. Neblett.

Isn't that right, Mr. Sonnenberg?

Mr. Sonnenberg: That is right.

Mr. Mackay: We have no figures available. It is a long time ago, 30 years ago, and we don't——

Mr. Neblett (Interposing): And Mr. Forbes' testimony is all you have on that?

Mr. Mackay: Yes.

Mr. Neblett: Very well.

The Court: That had not to do with accounts receivable but with investments, isn't it, on your balance sheet? [543]

Mr. Neblett: That is right.

Mr. Mackay: That is right, your Honor.

The Court: You were trying to tie that up with whatever you thought might be due and owing from captive saloons.

Mr. Neblett: That is right. We contend it was not investments but advancements to captive saloons. Your Honor recalls the situation.

Respondent calls Mr. Clack at this time, your Honor.

JAMES M. CLACK,

called as a witness by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your full name?

The Witness: James M. Clack, C-l-a-c-k.

By Mr. Neblett:

Q. Mr. Clark, what is your full name?

A. James M. Clack.

Q. And what is your present position?

A. Appraisal Engineer in the Bureau of Internal Revenue.

Q. How long have you been employed with the Bureau? A. Since 1922, January, 1922 [544]

Q. Starting with 1890 give us just a brief resume of your history, Mr. Clack.

A. I graduated from high school in 1890, studied engineering at the University of Missouri, in 1895 was unable to get any engineering work and ran for the office of City Tax Collector and was elected, the City of Nevada, Missouri, held that office for four years. In 1900 was appointed City Engineer of the City of Nevada, and was elected County Sur-

(Testimony of James M. Clack.)

veyor, Road and Bridge Commissioner, and held that office until 1912; those offices.

During those years I was a member of the City and County Board of Equalization which reviewed values of city and county property, and listened to appeals of taxpayers who thought their appraised values, assessed values were too high.

From 1912 until 1918 I was in the contracting business. In August, 1918, I went to work for the United States Shipping Board as Resident Engineer in Charge of Construction of a drydock at Jacksonville, Florida, shortly afterwards was made Assistant District Engineer of the Jacksonville District, and the following year was made District Engineer of Shipyards, Plants Division, Shipping Board, for the Southern District, with headquarters in New Orleans, held that position until 1922, when I received an appointment as, first entitled mortization engineer, shortly afterwards changed to Appraisal [545] Engineer, and have been on that work since that time.

In 1925 I was made Chief of the Appraisal Section of the Engineer Evaluation Division and held that position until 1925, and then as a result of ill health was given an assignment in Hawaii for two years, at the end of that time requested a transfer to San Francisco and have been here since.

Q. Now, Mr. Clack, what has been your experience with respect to appraisal of breweries?

A. During the years '23, '24 and '25 I examined several breweries' claims for obsolescence, made ap-

(Testimony of James M. Clack.)

praisals of the breweries for their value, or loss of value resulting from prohibition, including Schlitz Milwaukee for one and the United States Brewing Company of Chicago; several.

During that time I also examined a large number of appraisals, I supervised their inspection as chief of the section, appraisals prepared by the American Appraisal Company, Haskens & Sells, Price-Waterhouse, Ford-Baker and Davis, and a number of national accounting firms. Without intending to reflect on any of those, I might say during that time I was impressed by the fact that a large number of those appraisals, made up of several imposing looking volumes, contained a mass of detailed data which we were compelled to revise because they reached a sum total which, in our opinion, did not represent the amount that a practical business man [546] would have paid for the property.

Q. Did you examine all the breweries in San Francisco?

A. I have inspected all of them for the purpose of determining the rates of depreciation allowable on their equipment. I have made no appraisals of any of them.

Q. Yes. Now, Mr. Clack, were you asked to value at March 1, 1913, the sole and exclusive, perpetual right and license to manufacture beer, ale and other alcoholic malted beverages within the State of Washington and Territory of Alaska?

A. Yes, sir.

(Testimony of James M. Clack.)

Q. Under the trade name Rainier?

A. Yes, sir.

Q. And what investigation did you make with respect to forming an opinion with respect to that value?

A. I went to—I think I might explain that the return of the Rainier Brewing Company for the year 1940 reported sale of this trade name and set forth a March 1, '13, value which the Bureau instructed should be examined and investigated.

The Court: Just at that point let's have the return of the taxpayer for the taxable year.

What exhibit is that?

(The Clerk handed the document to the Court.)

The Court: So long as you are on that, would you just point out to me where that item is covered in the return? [547]

The Witness: Your Honor, this is the schedule of the instruction for the Engineering and the Evaluation Division requiring an investigation, and this is the schedule in the return.

The Court: This is the schedule that was inserted in the return by the taxpayer?

The Witness: And formed part of the return as filed, yes.

The Court: Well, did the item figure in the computation of net income for the year 1940?

The Witness: They explain in that schedule that "We reported no taxable income because there was neither gain nor loss."

(Testimony of James M. Clack.)

The Court: Well, why did they report that there was neither gain nor loss?

The Witness: They had no cost for the trade name, so that on the basis of cost it would have all been taxable, but the March 1, '13, value as claimed was in excess of the reported sale price. Since the sale price was greater than cost and less than the March 1, '13, value it is claimed there would be neither gain nor loss.

The Court: All right, Mr. Clack, will you continue?

The Witness: The direction of the Bureau to investigate the matter was based, of course, upon the facts [548] shown in the return. When I examined the agreement under which the payment was made the question arose as to whether it should be considered as a sale or as a payment of royalty, but since that was not an engineering question I paid no attention to it.

I went to Seattle, spent several weeks there, principally for the purpose of trying to determine the adverse effect, if any, on the value of this trade in 1913 because of the probability of prohibition, state-wide prohibition becoming effective.

I interviewed a large number of persons, both wet and dry, and professional men and others who were not emphatically either way, trying to form what might be termed a Gallup poll of the matter. I found quite a difference of opinion between different individuals who were there in '13 and who were acquainted with conditions, as to the probability of state-wide prohibition.

(Testimony of James M. Clack.)

It seems strange to me the drys were hopeful but not very optimistic, the wets, the breweries, were rather more cheerful, apparently. As I say, there was a wide difference of opinion, but I think without any question——

Mr. Mackay (Interposing): Well, now just a moment! He is stating the conclusions at the present time, Mr. Neblett, or is it still on the question of what he did [549] investigating?

Mr. Neblett: I am asking him what he did with respect to the investigation of conditions as of March 1, 1913.

Mr. Mackay: I object to it as hearsay testimony.

Mr. Neblett: It is not hearsay. He is an expert.

May the witness continue, your Honor?

The Court: Well, the witness was about to express an opinion.

Mr. Neblett: Yes, your Honor.

Well, you just go ahead with what you did up there.

The Witness: Well, I interviewed a large number of people both ways and——

The Court (Interposing): You mean you interviewed people who were living in Seattle in 1913?

The Witness: Right, yes ma'am; yes, your Honor, not only in Seattle, but in a few cities outside in the State of Washington, interviewed people who were living in the State of Washington in 1913 and who expressed to me their views, what their

(Testimony of James M. Clack.)

views were at that time as to the probability of state-wide prohibition becoming effective within a few years after that time.

I also investigated the question of the sale value of the trade name Rainier, the exclusive right to manufacture and sell alcoholic liquors, beer and malt liquors under the [550] trade name Rainier.

In that connection, your Honor, I found the year book of the United States Brewers Association for the year 1913 showed that there were 33 breweries operating in Washington; total number of barrels of beer produced in 1912 was 846,995. Of that number the Seattle Brewing and Malting Company, the data of the Seattle Brewing and Malting Company now shows that that company produced 309,810 barrels which would apparently indicate that the other 32 breweries produced a total of only 537,185 barrels, or an average per brewery of about 16,800 barrels, indicating that the other 32 breweries were of small capacity.

And I think there can be no question that the only willing buyer of this trade name would have been some other brewery operating in Washington.

Mr. Mackay. Well,——

Mr. Neblett (Interposing): Have you got an objection, Mr. Mackay?

Mr. Mackay: I just wondered if it is through his investigation.

Mr. Neblett: That is what he is supposed to be talking about, giving his investigation.

(Testimony of James M. Clack.)

By Mr. Neblett:

Q. Mr. Clack, did you talk to any brewers up there in Seattle? [551] A. Yes, sir.

Q. When you made your investigation?

A. Yes, sir.

Q. What did some of these men tell you about the situation?

Mr. Mackay: I object to that unless he specifies whom.

By Mr. Neblett:

Q. Well, who were some of the brewers that you talked to, Mr. Clack?

A. Well, I talked to Mr. Sick for one, of course, naturally, because he was the other interested party.

Q. Who was Mr. Sick?

A. A number of the others whom I talked to gave me the information confidentially and requested that their names be not made public.

Q. Well, now, did Mr. Sick ask you not to make his name public? A. No.

Q. Well, relate the conversation you had with Mr. Sick.

A. Well, in what respect? I didn't inquire of Mr. Sick at all as to the 1913 value.

Q. Yes.

A. My recollection is that Mr. Sick was not in Seattle [552] in 1913, although I am not sure of that.

Q. Yes.

A. Mr. Sick did inform me of several other men who were in the brewing business, older men whom I could interview.

(Testimony of James M. Clack.)

Q. Did you go and interview them?

A. Yes, sir.

Q. And did you get any opinion from them or any data that went into the formation of your opinion in this case?

A. I got opinions, definite opinions.

Q. From various——

A. (Interposing): Men who were engaged in the brewing business, or who were connected directly with the brewery business or the saloon business in Seattle in 1913.

Q. Do you recall, Mr. Clack, how long you were engaged in making your investigation?

A. Not exactly; two or three weeks up there altogether. I was on some other work also while I was there, another case. But my recollection is about—I put in about three weeks work on this particular work altogether, looking up the records of the laws that had been passed, and looking over old newspaper files, and anything that I could think of that would pertain to this matter.

Q. Now, Mr. Clack, did you form an opinion of value, of the fair market value of the right or trade name Rainier as of March 1, 1913, in the State of Washington and Territory [553] of Alaska? A. I did

Q. And now will you state to the Court the factors which you took into consideration and the assumptions that you made as the basis for your opinion of value?

A. The Seattle Brewing and Malting Company

(Testimony of James M. Clack.)

in 1913 had an investment in its plant of about $3,000,000. I could see no basis for assuming that they would sell their right, this trade name, and quit business.

The Court: Are you telling me about the plant in Seattle?

The Witness: In Seattle, yes. I think, if I may, at this time call attention to the difference in the commissions in 1913 and 1940 in the matter of production. In 1913 the Seattle Brewing and Malting Company had a plant in Seattle. Its production in the State of Washington was 171,902 barrels. In 1912, and outside the State of Washington 137,908 barrels.

In 1935 the Rainier Brewing Company brewery was located in the City of San Francisco. In 1936 its production outside the State of Washington was 290,788 barrels while their production of Rainier beer in Washington was only 74,091 barrels.

What I wished to emphasize is that in 1913 the Seattle Brewing Company was located in Seattle, and to have sold that name would—it would have sold what had constituted the bulk of its business.

In 1940 the Rainier Brewing Company could part with its Washington business without very greatly affecting its business as a whole.

In 1940 Mr. Sick had built and was operating a brewery in Seattle. He had his competitors, the other breweries of the state and the Rainier beer. The agreement he entered into not only gave him the exclusive right to manufacture and sell beer

(Testimony of James M. Clack.)

under the name Rainier beer but it also agreed that Rainier would not compete with him through the sale of any other—in any way through the sale of any other kind of beer.

I think that the price paid for the elimination of competition was fully as much as the price paid for the use of the name. That, of course, is an opinion.

By Mr. Neblett:

Q. Yes.

A. Getting back to 1913, I attempted to estimate what a willing buyer, might, or what a prospective buyer might have been willing to pay for this right on the following basis: The average investment of the Seattle Brewing and Malting Company in tangibles from 1908 to 1912, the average, including accounts receivable, this item which has been discussed, was $3,049,000. A 9 per cent return on that amount would be $274,000 annually.

The data presented by the taxpayer shows the average [555] income during those years at $383,000; $383,018.90.

If from that amount we deduct a return on tangibles we have left $108,581 excess earnings which might be attributed to intangibles. Of that amount, although the sales of beer by Seattle Brewing Company in 1913 outside the state were very nearly as great as those inside, the profit from the sales within the state was much greater. 80 per cent, about, of that profit, as I think it has been testified, was at-

(Testimony of James M. Clack.)

tributable to sales within the State of Washington. So that of this $108,000, if 80 per cent of that is considered as attributable to the sales within the State of Washington you would have a figure of $86,865. Of the barrels of beer sold by the Seattle Brewing Company during the years 1908 to 1912, the average was 159,415 barrels annually, which would show a profit per barrel apparently above the cost of manufacture and above a return on intangibles of 51 cents a barrel.

Now, if we may assume that in 1913 Seattle Brewing and Malting Company for some reason had decided to discontinue the use of the name Rainier and to dispose of it, to abandon it, or sell it, and some other brewer, a prospective buyer who was in a position to manufacture beer at no greater cost than Seattle Brewing and Malting Company had, could anticipate a profit of 51 cents a barrel on his sales.

The Seattle Brewing and Malting Company was an old and well established concern with an active sales organization, [556] and without question with considerable control over a large number of the saloons. I think that a prospective buyer—I think the Seattle Brewing and Malting Company, if it had sold the name Rainier and placed another brand on the market, could have retained at least 50 per cent of its former trade, that the purchaser of the name Rainier beer would not have been able, because of the name alone, to hold more than 50 per cent of that business.

(Testimony of James M. Clack.)

He could have, on that basis, anticipated annual sales of about 85,000 barrels, one-half of 169,000. And if he could have manufactured and sold that beer at no greater cost than Seattle Brewing and Malting Company he could have shown a return, an annual return on the name of $43,200.

If the prospective buyer of the right to use the name had not given any greater effect to the possibility—not given too much effect to the possibility of statewide prohibition becoming effective he might capitalize that at 16 2/3 per cent, which would indicate a value of $259,200.

By Mr. Neblett:

Q. As of what date?

A. As of March 1, '13, which, in my opinion, is the amount which a willing buyer might at that time have felt justified in paying for this right, the exclusive right and perpetual right to manufacture and sell beer in the State of Washington under the name Rainier, assuming that the Seattle [557] Brewing and Malting Company was to continue in business, and put another brand of beer on the market, and that he would have to compete with them.

Q. Does your evaluation cover the State of Washington and the Territory of Alaska, Mr. Clack?

A. Well, I have taken the data of sales from the data presented by the taxpayer, whatever they have. I made no change in those.

Mr. Neblett: Yes, that is all the direct examination, your Honor.

(Testimony of James M. Clack.)

Cross Examination

By Mr. Mackay:

Q. Mr. Clack, what value did you say?

A. Final figures?

Q. Yes. A. $259,200.

Q. You knew that the Commissioner of Internal Revenue had made a computed value in 1918 of something like four hundred, didn't you?

A. I think that is it.

Q. Yes. Now, Mr. Clack, you went to Washington, didn't you, in about 1942, the summer of 1942?

A. Of '22?

Q. '42? A. '42 to Washington. [558]

Q. Yes.

A. Oh, to the State of Washington?

Q. Yes, to the State of Washington?

A. Yes, sir.

Q. And you went up there principally to—I understood you to say you went up there principally to investigate the adverse conditions with respect to prohibition? That is the principal reason you went, wasn't it? A. Yes, sir.

Q. You wanted to make sure you could find out everything that you could that may be adverse to establishing a pretty good value, didn't you?

A. Yes, sir.

Q. Mr. Clack, when you were up there I think you stated that you saw Mr. Sick, didn't you?

A. Yes, sir.

(Testimony of James M. Clack.)

Mr. Neblett: Speak up a little, Mr. Clack, so we can get it.

The Witness: Yes.

By Mr. Mackay:

Q. Mr. Sick, you knew to be the President of the then Seattle Brewing and Malting Company?

A. Yes, sir.

Q. And you knew at that time that he had this contract, I mean that they had purchased—I withdraw that. [559]

You knew that he was a party to the contract in April, 1935, didn't you? A. Yes, sir.

Q. At that time you also knew that Mr. Sick had a tax case before the Tax Court, didn't you?

A. I am not sure that it had yet come before the Tax Court.

Q. Well, all right, the Bureau of Internal Revenue was considering it?

A. May I say that Mr. Sick discussed with me the question of whether or not I would take up for him with the Seattle office a settlement of his case.

Q. Yes. And Mr. Sick, didn't he tell you that he was willing to concede that at least part of the amount that he gave was in consideration for the acquisition of goodwill? A. He did.

Q. He did, didn't he?

A. Mr. Sick told me that he would be willing to settle the case on the basis that part of it was goodwill and part of it was advance royalty.

Q. Yes. And at that time you knew that Mr.

(Testimony of James M. Clack.)

Sick—there had been considerable ill feeling between the Sick crowd and the Rainier Brewing Company?

A. Mr. Sick had informed me of that fact.

Q. Yes. [560]

A. I don't think I knew it before.

Q. But he took pretty good pains to tell you, didn't he? He didn't hold anything back?

A. No, I think not.

Q. Mr. Sick at that time was operating the biggest brewery in the State of Washington, wasn't he?

A. Well, I am not sure. I think he was; I think his brewery was——

Q. (Interposing): Oh, you did? A. Yes.

Q. Well, he was still, his brewery was still manufacturing, and they were selling Rainier at that time, weren't they, in '42? A. Mr. Sick?

Q. Yes. A. Oh, yes.

Q. And that was the largest brewery in Seattle, wasn't it?

A. Mr. Sick's brewery was the largest in Seattle in 1942?

Q. In 1942?

A. Oh, yes, in Seattle, yes; I am quite sure.

Q. Didn't Mr. Sick also tell you that the value of the trade name Rainier on March 1, 1913 was very low?

A. I have no recollection of that fact. [561]

Q. But you wouldn't deny that he said it?

A. No. Mr. Sick—may I say Mr. Sick informed me that, in his opinion, the value of the trade name

(Testimony of James M. Clack.)

in 1935 when he made this contract was not nearly as great as it was in 1940 when he made the payment, that he had increased its value substantially by his own efforts.

Q. And didn't he tell you that the entire good value of the trade name was built up between 1935 and 1940? A. Not the entire value, no.

Q. But he gave you that impression, didn't he, that most of it had been?

A That he was responsible for building up a large part of the value in 1940.

Q. That, Mr. Clack, influenced you somewhat, didn't it, in trying to arrive at a fair market value here? A. In 1913?

Q. Yes. A. Well, I tried to keep from it.

Q. I know, but you considered it a little, didn't you?

A. Mr. Sick informed me that he would not in 1945 have paid $1,000,000.

Q. I know, but I didn't ask you that.

A. Pardon me.

Q. I asked you did that influence you a little?

A. Possibly.

Q. Be perfectly fair.

A. Possibly, it may have.

Q. Before you went up there you had been pretty familiar with the terms of that contract; were you not, Mr. Clack? A. I think so.

Q. When Mr. Sick told you, or tried to take claim for building up the goodwill to $1,000,000 in 1940, and it had little value in 1913, you didn't call

(Testimony of James M. Clack.)

attention to the provisions of the contract, did you?

A. I have no recollection of having done so.

Q. No, you didn't go to the trouble of calling his attention to a clause in the contract where it says: "Whereas, Rainier and its predecessors in interest have for many years sold and marketed products in the State of Washington and in the Territory of Alaska under the trade name brands 'Rainier' and 'Tacoma,' and said names and brands are well and favorably known in the State of Washington and Territory of Alaska?" A. No.

Q. Mr. Clack, you have been in the Government service a long time, haven't you?

A. It seems like a long time.

Q. Yes. I think you have done a pretty good service. But tell me why, if you were going to try to determine a [563] reasonable value for tax purposes of a matter, you would go to a man who was the opponent, say, a friendly enemy, or an enemy of the taxpayer?

A. Pardon me, Mr. Mackay, but I am quite certain that Mr. Sick expressed to me no opinion whatever as to the March 1, '13 value of this trade name. I did not ask him his opinion.

Q. Well,——

A. (Interposing): I didn't think he was qualified to pass upon it.

Q. Well, whose opinion did you get in Seattle, or whose opinion influenced you in arriving at your value?

A. As I said, I interviewed a number of people

(Testimony of James M. Clack.)

in different walks of life who were in Seattle in 1913.

Q. What other brewery man in Seattle did you talk to at that time?

A. As I have told you, the most of the information given me was confidential.

Q. I see. Most of your talks were with Mr. Sick?

A. Just a minute! Most of the brewers, naturally.

Q. You talked to Sick and his whole organization, didn't you, including Mr. Allen?

A. Not his whole organization.

Q. Well, I shouldn't say that. Mr. Allen?

A. I talked—the principal purpose for interviewing [564] Mr. Sick and other members of his organization was to try to find out the records of the old company at the Georgetown plant, what had become of them. I wanted to examine those records but was unable to find them.

Q. But you didn't talk to Mr. Sick about the conditions in Washington in 1913?

A. I think not.

Q. Not at all? A. Not at all.

Q. Wasn't Mr. Sick—he had been in the brewery business up there a long time, hadn't he?

A. I think not.

Q. You didn't even inquire whether he had been?

A. He may have. I really don't remember. I don't remember.

(Testimony of James M. Clack.)

Q. When you go to get information to impose a tax upon a taxpayer don't you get the background of the man whom you discuss that with to find out whether you get information that is worth anything? A. Right!

Q. And you made no investigation of Mr. Sick?

A. I think I made sufficient investigation of Mr. Sick to reach the opinion that he was not qualified to pass upon the March 1, 1913, value.

Q. I admit he isn't qualified to pass upon that. [565] Now, Mr. Clack,——

A. (Interposing): May I——

The Court (Interposing): You are all finished.

The Witness: Oh, all right!

By Mr. Mackay:

Q. Mr. Clack, did I understand correctly that, in your opinion as an expert, that it was possible in 1940 to sell the trade name Rainier but it was impossible in 1913? A. No, sir.

Q. What did you mean when you said that?

A. I didn't intend to say that.

Q. Well, what did you say?

A. I may have said that it was my opinion that it would have been impossible in 1913 to have sold this trade name for $1,000,000.

Q. Well, would it have been impossible, in your opinion, to have sold the trade name in 1913 at some figure?

A. I have said $259,000, that it is my opinion it might have been sold for.

(Testimony of James M. Clack.)

Q. Could the trade name at that time, in your opinion, have been sold by itself?

A. Yes, in my opinion, yes.

Q. Yes. Mr. Clack, did you investigate how much money had been spent on advertising and building up the trade name Rainier by the Seattle Brewing and Malting Company from 1893 [566] to 1913?

A. I did not. I thought the earnings——

Q. (Interposing): You weren't interested in finding how much money had been spent?

A. I thought the earnings were the best evidence.

Q. I agree with you, they are.

Did you ascertain whether or not the Seattle Brewing and Malting Company had received any medals for outstanding quality beer?

A. I did not.

Q. You weren't concerned with that? You didn't try to find out how it stood with relation to other brands in there so far as quality was concerned, did you? A. No.

Q. That is right. Now, Mr. Clack, you say that you took the earnings of this company and that you based your value upon the earnings. I think you will agree with me that—well, the evidence shows, I think you stated, that the average earnings for the five years ending June 30, 1912, were $383,000, approximately? A. Yes.

Q. And that was for the whole company, wasn't it? A. Yes, sir.

(Testimony of James M. Clack.)

Q. And I think you have stated that 80 per cent of those were attributable to Washington? [567]

A. That is, I have accepted the data furnished on the question.

Q. Yes, and that, of course, was the cream of the business, that is, where they sold retail, wasn't it? A. Right!

Q. And an average income of $383,000 is quite a figure, isn't it? A. Yes, sir.

Q. Would that indicate to you, Mr. Clack, that there must have been quite a demand for the product? A. Yes, sir.

Q. There must have been quite a demand, mustn't there? A. Yes, sir.

Q. And the profits were made, in your opinion, because of the demand, weren't they?

A. Undoubtedly!

Q. You couldn't make those sales unless there had been the demand? A. No.

Q. Now, the demand was there because there had been a lot of advertising, the name "Rainier" meant an awful lot to people in the State of Washington, didn't it?

A. Undoubtedly means—has a value, the name alone had a value at that time. [568]

Q. Yes, it is that famous mountain, isn't it?

A. Right!

Q. And did you look to see whether the labels on all of Rainier carried the picture of Mt. Rainier on it? A. I think I did. I remember that.

(Testimony of James M. Clack.)

Q. And the Washingtonians take great pride in that mountain, don't they?

A. Some of them preferred Tacoma, I believe.

Q. Yes, but anyway they take great pride in Rainier, don't they? A. Yes.

The Court: They are the two names given for the same mountain, is that correct?

The Witness: Yes.

By Mr. Mackay:

Q. Mr. Clack, isn't it possible, or, in your opinion, if Anheuser Busch in 1913 had wanted to come into the liquor business, I mean into the beer business in the State of Washington and in the Territory of Alaska, and they had had sufficient money to buy a brewery, that they would have been willing to pay more than $275,000 for the trade name Rainier?

A. I doubt whether they would have purchased it at all, or not, and used it. I think they were too proud of their own name.

Q. Well, let's take some other big company. Let's [569] take Pabst. That isn't so good, is it?

A. Just the same situation.

Q. Yes, you never made a comparison, did you, Mr. Clack, of the amount of Pabst beer sold in Washington compared with the Rainier beer, did you? A. No, sir.

Q. You didn't do that? A. No.

Q. Why? A. For what purpose?

Q. Well, to find out whether or not there was any public demand for the product, I mean for the

(Testimony of James M. Clack.)

product which was sold under the name Rainier? You don't think that is important?

A. I still think the best evidence is the income derived from the sale of Rainier beer.

Q. Now, Mr. Clack, what did you give for your intangibles, the earnings on intangibles?

A. You mean the percentage?

Q. No, I withdraw that. I think you gave a figure—did I understand you to say that you figured a net investment for those five years of $3,049,000?

A. I did.

Q. And you included in there, I think, accounts receivable, didn't you? [570]

A. I did.

Q. Mr. Clack, have you ever conducted any negotiations for the sale of any business?

A. No, sir, not that I remember.

Q. Well, you know, as a matter of fact, that if someone is coming to buy a business that you ordinarily don't sell your accounts receivable, don't you?

A. I know, as a matter of fact, that if a corporation is conducting a business it must have a substantial investment in that to take care of accounts receivable.

Q. Yes.

A. And that that is part of its investment.

Q. Well, then, let me put it this way: You have been through a lot of records and have examined a lot of re-organizations and everything else. Let me put it this way, to be perfectly fair: Isn't it a fact

(Testimony of James M. Clack.)

that a purchaser buying a business like a brewery business and a trade name is not at all concerned with accounts receivable, or just investments in stocks and bonds? They are the equivalent of cash?

A. I think that a purchaser of this right who is going to operate a brewery would have to have had a substantial investment to take care of accounts receivable.

Q. You are not answering my question.

A. Pardon me.

Q. Now, suppose that this hypothetical person had all [571] the investments he wanted, he didn't want the stocks and bonds that the seller had because he considered them cats and dogs, or, maybe, he didn't.

A. I didn't include stocks and——

Q. Wait a minute, please!

A. Pardon me.

Q. And assume that it had all the accounts receivable it wanted, and it didn't want to take over the accounts receivable of the seller, don't you think that that kind of a buyer would have purchased the business, trade name of Rainier, without taking these investments?

A. I didn't think we were discussing the fair market value of the plant. This is only the trade name.

(Testimony of James M. Clack.)

Q. Well, I am just trying to test your ability, I mean your expertness here. I will come to that later.

Will you answer the question?

The Witness: May I ask you to repeat it?

Mr. Mackay: Please read it.

The Court: Recess for a few minutes.

(Short recess.)

The Court: Will you read back the last question?

(The question referred to was read by the reporter.)

A. I think a purchaser of the trade name—I am not assuming that a purchaser of the trade name would have purchased the investments or these accounts receivable. [572]

By Mr. Mackay:

Q. I see. A. I am not.

Q. Now, I think that you said the average earnings, five-year earnings were $383,000?

A. Right.

Q. And what was your average investment?

A. $3,049,000.

Q. Is that the average investment?

A. Including the bills receivable, or accounts receivable, but not stocks and bonds.

Q. Now, how did you get that three million figure you just gave me? A. $3,049,000?

Q. Yes.

A. From the schedules; your schedule.

(Testimony of James M. Clack.)

Q. Well, does that represent the average for the five years? A. Right.

Q. Are you sure?

A. Unless I made some mistake in computation, yes.

Q. Didn't you use the actual investment as of June 31, 1912?

A. No, sir. It is intended to represent the average investment for the five years, including the accounts receivable, which run about $500,000, as I remember. [573]

Q. Then you get a total average investment of what? A. $3,049,000.

Q. $3,000.000——

A. Pardon me, Mr. Mackay. I think, if I may explain, I think you have used a figure in here of $2,500,000, about, I believe, as the average investment.

Q. Yes.

A. The only difference between us is that that doesn't include the accounts receivable and my figure does.

Q. Oh. Oh, I see. So put your accounts receivable in there? A. Right.

Q. Do you mean the bills receivable?

A. Well, bills receivable, the item of $500,000, approximately. May I explain?

Q. Yes.

A. In my opinion, the amount that a prospective purchaser would have paid for this trade name would be based upon the income that he could—the

(Testimony of James M. Clack.)

profit that he could make from it in the future above the cost of manufacture and above a return on the investment that he might need in order to carry on the business.

Now, I have assumed that a prospective purchaser could manufacture the beer at the same cost that Seattle Brewing and Malting Company did, which required including bills [574] receivable, required an average investment of $3,049,000.

Q. Well, now, let's just talk in round numbers.

The Court: Are you finished?

The Witness: Yes.

Mr. Mackay: I am sorry.

The Court: Are you finished?

The Witness: Yes.

The Court: Go on.

By Mr. Mackay:

Q. Assume that the average investment was $3,000,000 and you had average earnings of $383,000, what per cent return is that upon your investment? It would be over 20 per cent, wouldn't it?

A. Well, 10 per cent of $3,000,000 would be $300,000, would it not? 20 per cent would be $600,000.

Q. Well, it would be 12 per cent?

A. Approximately 12 per cent on total return, right?

Q. Now, tell me again what you consider to be tangible assets upon which you applied the 9 per cent return?

(Testimony of James M. Clack.)

A. Well, if I may, it is the average investment shown by your schedules for these five years, plus the item—is it bills receivable?

Mr. Neblett: I think that is Exhibit 23.

The Witness: Average, about $500,000, as I remember it, for the period. [575]

Mr. Neblett: Mr. Clack, I hand you Exhibits 13 and 24, and I think this will give you the information.

The Witness: (Examining documents) This statement, Exhibit 24, shows the net tangible assets value as above for the different years.

By Mr. Mackay:

Q. Well, can you give the average? We don't want to go over all those.

A. Well, I know, but I am pretty sure that is the figure which you use as an average, of $2,500,000.

Q. I will withdraw that question.

Let me ask you this: If you eliminate the bills receivable as part of the intangible assets what average in net investment would you obtain?

A. About $2,500,000.

Q. And that is the figure that Forbes gets?

A. Right.

Q. Now, let's assume that with a $2,500,000 investment in tangible assets, and with an assured income of $383,000, how much could a willing buyer pay and make a fair return on his money?

A. Shall I take time to make that computation? It will not take very long.

Q. It shouldn't take long to make that.

(Testimony of James M. Clack.)

A. No. A 9 per cent return, I think, on the two million [576] five would be two hundred and twenty-five thousand a year.

Q. Yes.

A. From the $383,000 it would leave $178,000 apparently.

Q. Well, now, where do you get your 9 per cent return on tangibles? How do you justify that?

A. That gives some consideration to, in my opinion, the hazards of the business.

Q. I see. Now, you have got, then, $175,000 attributable to good will, haven't you?

A. Yes, right.

Q. And what do you think that ought to be capitalized at?

A. Pardon me. That is the total?

Q. Yes.

A. About 80 per cent of that.

Q. No, no, I am talking now of just that alone.

A. The total? Do you want me to express an opinion as to the value of the good will of this company, which is not an issue?

Q. No, I merely asked you—you told me now that you allowed 9 per cent.

A. On the tangibles.

Q. On the tangibles, and that there was $75,000 applicable to intangibles. [577] Now, how would you determine the value of the intangibles?

A. On the basis of the facts, to multiply about

(Testimony of James M. Clack.)

20 per cent to that, in 1913, to the entire good will.

Q. 20 per cent?

A. Not less than that.

Q. And that would be, then, just five times 175, wouldn't it? A. Right.

Q. That would be an 875,000 value then, wouldn't it? A. Apparently.

Q. Now, if you applied a 16 2/3—now, if you capitalized them at 16 2/3 what would you get?

A. Well, Mr. Mackay, if you——

Q. (Interposing) You would multiply that by 6, wouldn't you? A. Yes, sir.

Q. And that would give you something over a million dollars, wouldn't it? A. Yes, sir.

Q. That would give you $1,088,000, wouldn't it?

A. Yes, sir, approximately.

Q. I mean $1,088,000. A. Yes.

Q. Approximately? [578] A. Yes, sir.

Q. Well, didn't I understand you to say that you should capitalize the 16 2/3 per cent?

A. I did.

Q. Yes.

A. Well, pardon me now just a moment. Let me see if I am doing this—80 per cent of that applies to the State of Washington.

Q. Yes. A. $800,000 is left.

Now, a purchaser of the right could not acquire over 50 per cent of that.

Q. Oh, that is the reason.

A. That is the reason.

(Testimony of James M. Clack.)

Q. Then if a buy in 1913 would have been willing to take just the brewery business——

A. The entire plant?

Q. Yes, and without these investments and the trade name, there would have been a very substantial value, wouldn't there?

A. If a buyer of the entire property in 1913——

Q. Yes.

A. If the issue were the value of the entire property, the plant, the total good will, including in it the Orient and South America and a dozen states in the United States, [579] and everything, the good will would have—the property would have a substantial value.

Q. Yes, and that would be around a million and four hundred thousand dollars, wouldn't it, based upon a 16 2/3 per cent capitalization?

A. Total value of the good will?

Q. Yes, I mean for the total amount?

A. I mean, approximately, yes, of approximately that.

Q. Yes. Well now, if the cream of the business was in the State of Washington and 80 per cent of the profits came from Washington why wouldn't the value be 80 per cent of the total?

A. The hazard.

Q. Can you answer that?

A. The hazard. The business was in the State of Washington. There was no great probability of prohibition taking place outside the State of Washington.

(Testimony of James M. Clack.)

Q. Oh, well now, we will put it this way: Assuming there was no probability of prohibition then the fair thing to have done would have been to take 80 per cent of your total, of $1,400,000 and say that was applicable to the State of Washington and Alaska, wouldn't it? I am assuming now that prohibition was not imminent.

A. You are valuing now the good will of the Seattle [580] Brewing and Malting Company——

Q. (Interposing) You understand——

A. (Interposing) And not——

The Court: (Interposing) Let the witness finish.

> "You are valuing now the good will of the Seattle Brewing and Malting Company and not what?"

The Witness: And not what a prospective buyer would acquire. I am valuating what I think a prospective purchaser, a willing buyer would be able to acquire.

By Mr. Mackay:

Q. Well now, let's be fair. I don't want to be unfair with you, Mr. Clack, at all.

Let me put it again. We have already assumed here that if you are putting value, based upon earnings, in the net investments, (we have talked about that) we would arrive at approximately $1,400,000 value of the goodwill for the whole amount.

Now, let's assume that prohibition was not imminent.

(Testimony of James M. Clack.)

The Court: He doesn't want to assume that.

The Witness: Why should I?

By Mr. Mackay:

Q. Oh. Well, if you don't want to assume it won't you please assume it just for me, just if you can? Please eliminate from your mind prohibition.

Now, in all fairness, then, wouldn't you take 80 [581] per cent of that value and allocate it to Washington and the Territory of Alaska?

A. Yes.

Q. Yes, that is right. A. Right.

Q. So then your big trouble, Mr. Clack, is that you are convinced, I think, that prohibition was such a hazard up there that there couldn't have been any value at all?

A. No. Pardon me, no. The other doubtful clause in my mind is the amount of business that the prospective buyer could hold.

Q. Oh.

A. There is no—pardon me—there is no question in my mind. I will agree that, disregarding the possibility of prohibition, that Seattle Brewing and Malting Company had a valuable plant and a valuable goodwill. It is when you consider the purchase of the trade name alone, the two adverse features, as I see it, of the possibility of prohibition and the amount of the business which a prospective buyer could—I see no reason for assuming that the Seattle Brewing and Malting Company would abandon its

(Testimony of James M. Clack.)

$3,000,000 plant to sell its trade name for $1,000,000 and just lose the rest of it.

Q. But, if somebody wanted to buy it maybe they would want to go out of business? [582]

A. Who?

Q. The Seattle Brewing and Malting Company. They may take their money for a physical plant and good name and just quit.

A. Well, pardon me, but I think that is an absurd assumption.

Q. Oh. Well, it wouldn't be the first time a buyer has been absurd.

Well now, Mr. Clack, I think you stated a while ago that you never made any investigation to determine the comparative value in the minds of the people of Washington of the various kinds of beer, and particularly Rainier.

Now, based upon that can't you assume that the demand was so great for Rainier that a purchaser of the trade name would have gotten the benefit of that public demand?

A. I was informed repeatedly by well informed brewers and saloon keepers that the income of the Seattle Brewing and Malting Company in 1913 was not nearly as much attributable to the name Rainier as it was to their organization and control of saloons.

Q. Oh. Well, who informed you that?

A. The different people that I interviewed.

Q. Tell me one, please. A. Not Mr. Sick.

(Testimony of James M. Clack.)

Q. Are you sure of that? [583] A. Yes.

Q. Are you, really?

A. Pardon me. May I explain this matter a little further, about Mr. Sick?

Q. O.K.

A. Several days ago I had to investigate the March 1, 1931 value of Santa Cruz Island, about 20 miles off the coast of Santa Barbara. It was sold to a man by the name of Mr. Stanton in Los Angeles. I went to Mr. Stanton and interviewed him as to his reason for purchasing the island in order to form some idea of a factor that might be given consideration in determining the value.

My personal purpose in interviewing Mr. Sick was to see what his views were as to whether he considered it a purchase or a license.

Q. Oh, you had to determine that first, didn't you?

A. I didn't have to determine that, no, but I included in my—I felt it part of my duty in my report to set out the facts.

Q. You are an engineer?

A. Yes, yes sir, I am presumed to be.

Q. And when you got this report you were an engineer. I understood you turned that over to somebody else because that was not in your province. So you go up to Washington to see Mr. Sick to determine whether or not it is a sale or a [584] royalty? A. No, sir.

Q. Now, Mr. Clack, do you know that in the State of Washington and the Northwest there are

(Testimony of James M. Clack.)

now no saloons? You know it is under State Liquor Control? A. Right.

Q. And you know that that has been that way ever since even before—I mean since the repeal of prohibition? A. You can still buy beer.

Q. Of course, you can buy beer, but you buy it in the grocery stores.

A. You can buy it over the bar.

Q. But they don't have saloons except controlled by the State?

A. Yes, I have been in the bar of the Olympic and bought a glass of beer several times.

Q. Did you make an investigation to determine whether or not a brewery now or since the repeal of prohibition could have any interest in a saloon?

A. I think not.

Q. No, you didn't?

The Court: What? Let's be clear about that. You say you think a brewery now couldn't?

The Witness: No. I said I made no investigation as to whether a brewery now can have any interest in a [585] saloon.

The Court: I see. You did not investigate that?

The Witness: At the present time.

By Mr. Mackay:

Q. You didn't investigate, or did you, to find out how much beer Century had sold, the new Seattle Brewing and Malting Company, since it got the name Rainier in the State of Washington?

A. Yes, I have a statement of their sales.

(Testimony of James M. Clack.)

Q. Now, you did not investigate whether or not the captive saloons in the period from 1935 to 1940 increased the sales of Century, did you?

A. I did not think any investigation was necessary on that question.

Q. Well, you considered captive saloons a very important part in your——

A. (Interposing) No, but they were there, and they were selling the beer, and the volume of sales spoke for themselves.

Q. Yes.

A. It showed that the sales increased very rapidly from 1935 to 1940 of Rainier beer in the State of Washington.

Q. How could you as a valuation expert come to the conclusion that it was the sale through a saloon or an institution where a brewery had some interest in it that was [586] responsible for the earnings without finding out the demand from the public for the beer being sold under that name?

A. I made no——

The Court: (Interposing) At what time?

Mr. Mackay: 1913.

The Witness: I made no determination——

By Mr. Mackay:

Q. (Interposing) Oh, I see.

A. (Continuing) ——to the amount of that.

Q. No, but you just considered that one of the big factors that you couldn't?

A. One of the uncertain factors.

(Testimony of James M. Clack.)

Q. That is just a guess, isn't it?

A. I beg your pardon?

Q. That was just a guess, wasn't it, on your part?

A. I knew it was there but I didn't know how much.

Q. You knew it was there but you didn't investigate to find out for sure. And isn't is a fact you went to see Mr. Scruby of the Bank?

A. What bank?

Q. I don't know the bank. Did you see Mr. Scruby? A. I don't remember.

Q. He is the nephew of Mr. Hemrich?

A. I think so, yes.

Q. Yes, you saw him, didn't you? [587]

A. Yes, sir.

Q. And you saw him to determine whether or not the goodwill on March 1, 1913 had any value, didn't you? Isn't that a fact, Mr. Clack?

A. Probably, yes, I think so.

Q. And Mr. Scruby has been a clerk in a bank for 30 or 40 years, hasn't he?

A. I really don't know about that.

Q. You didn't find out? A. No. Why?

Q. Well, you weren't interested in finding out whether he was a competent man to give an opinion, were you? A. Yes, sir.

Q. Did you find out—well, I withdraw that.

You didn't even make the effort to determine whether he was a competent man to give you any opinion on values at all, did you?

(Testimony of James M. Clack.)

A. Frankly, I don't remember Mr. Scruby at all. I remember going to some bank and talking to some individual there who I was informed knew something about the matter.

Q. Maybe, if you don't remember—didn't he tell you something about a little fight he had with Mr. Hemrick, and that he didn't get any inheritance?

A. I think not. I have no recollection of it.

Q. You have no recollection of it? [588]

A. No. I think if he had I would have been able to disregard it.

Q. I think you stated you investigated several other professional men up there to help you in this task of determining the fair market value. Now, who were they?

A. Well, as I save said before, the information was confidential. I haven't their names here with me, and I can't name them from memory, the different individuals. There were quite a number of them.

Q. You were much concerned with prohibition, weren't you? I mean that influenced your judgment in determining values?

A. Well, you have heard my computation of the percentages.

Q. Yes.

A. Nine per cent return on tangibles and 16 2/3 per cent on intangibles.

Q. Well, did you come to those percentages——

A. (Interposing) Would you say that those were influenced very greatly by the probability of

(Testimony of James M. Clack.)

statewide prohibition? Those are percentages that I used. Your own witnesses have used the same percentages here.

Q. Well, now, you went up there to find out, as I understand, principally to find out what adverse effect the element of prohibition, the imminence of prohibition would [589] have upon the breweries at that particular time? I think you stated that.

A. Right. And I would like to say, Mr. Mackay, that, frankly, if the effect was an adverse effect as I found it, it was not as great as I expected to find it.

Q. Oh, you had preconceived notions before?

A. No.

Q. Well, now, let me ask you this: Did you make an investigation in Washington to determine whether breweries were expanding their plant equipment, plant and equipment? A. Yes.

Q. You did? A. Yes, I did.

Q. Did you find how much Seattle Brewing and Malting Company had expanded?

A. Yes, I had that information, I think, before I went up there.

Q. You don't think that as a reasonable man—I will put it this way: Do you think that a reasonable man who has been capable of building that business up from 1904 from $65,000 to $310,000 in 1913, paying two $1,000,000 stock dividends, reaching a point where we have earnings of $383,000, do you think that men of that caliber would fly in the face of a

(Testimony of James M. Clack.)

threat of prohibition and spend $400,000 in '13 and '14?

A. I think there is a very wide distinction between [590] spending $400,000——

Q. (Interposing) Can you answer that "Yes" or "No"?

The Court: Well, he is trying to answer.

Mr. Mackay: Oh, I am sorry.

The Court: Go ahead.

The Witness: I think there is a very wide distinction between spending $400,000 in addition to a plant and in making an investment of $1,000,000 in intangibles in buying a future right; a wide difference.

I think Seattle Brewing and Malting Company might have spent $400,000 in improving their plant and yet have refused to spend $400,000 to acquire a trade name from anyone.

Q. Well, but they didn't need a trade name, they had a trade name that built them up $383,000.

A. I am sorry, I can't assume they had any—we are having to make a number of assumptions.

Q. Well, the values that you get, based upon all these earnings, were attributable to the trade name, weren't they? A. No.

Q. They weren't? A. No; goodwill.

Q. You never checked up the advertisements to see how it is advertised? Rainier? A. No.

Q. Wasn't Rainier the one that was advertised all the [591] time to promote the product?

A. That is right.

(Testimony of James M. Clack.)

Q. Wouldn't that be the one that was producing the income? A. The name?

Q. Yes.

A. Not in my opinion, not in the face of an old organization. They could have sold practically the same without the use of "Rainier," or very nearly, without the use of the name, in my opinion.

Mr. Mackay: That is all.

Mr. Neblett: Just one or two questions, your Honor.

Redirect Examination

By Mr. Neblett:

Q. Mr. Clark, in your computation there a while ago I believe you multiplied $2,500,000 by 9, resulting in $225,000, which deducted from $383,000 would leave $158,000 instead of $178,000.

A. I made these computations rather hurriedly.

Q. Yes.

A. And they probably were incorrect.

Mr. Neblett: I wanted to correct the record in that respect, your Honor.

The Witness: You shouldn't have any difficulty [592] with that.

By Mr. Neblett:

Q. Will you check that and see if I am right? I don't want any error. I don't wish any inaccuracy in the record in that respect, Mr. Clack.

The Witness: That would give, would it not, 158,000?

(Testimony of James M. Clack.)

By Mr. Neblett:

Q. Yes, that is my calculation.

Mr. Clack, your conclusion, based on whether or not the figure was 158,000 or 178,000, would be altered in proportion, would it not?

A. Right.

Q. Now, Mr. Clack, I believe you stated the Bureau determined an intangible value as of March 1, 1913 for the Seattle Brewing and Malting Company of $406,680.20.

What was your statement in that respect?

A. I think that Mr. Mackay——

Q. (Interposing) Asked you that, did he?

A. Stated that, yes.

Q. Exactly. Now, I want to ask you what did that value include? Was that just for the name Rainier, or the goodwill value, or intangible value of Seattle Brewing and Malting Company as of March 1, 1913, we will say, for the whole world? [593]

A. My understanding is it was a value placed by the Bureau on the entire goodwill of the Seattle Brewing and Malting Company.

Q. As of March 1, 1913?

A. As of March 1, 1913.

Q. And not only fair market value as of March 1, 1913 of the trade name alone? A. No.

Q. Rainier? A. Right.

Q. Mr. Clack, just one more little question.

What did you conclude about the imminence of prohibition, or the possibility of prohibition in the

(Testimony of James M. Clack.)

State of Washington after you had completed your investigation?

A. I concluded that in 1913 there was at least a very definite and distinct possibility of statewide prohibition becoming effective within the next few years. I would like to add that there is no one, I think, could say just how definite that was, or exactly what effect should be given to it. It was there; it was recognized.

(Witness excused.)

Mr. Neblett: Your Honor, I have one exhibit that we wish to get in, which is an exhibit in the Seattle Brewing and Malting Company case, Docket No. 2265. This exhibit was Exhibit 16 in that case, and it is a schedule of [594] Rainier advertising, the name "Rainier" by Seattle Brewing and Malting Company.

The Court: You mean advertising costs?

Mr. Neblett: Yes, what they spent for advertising the name "Rainier."

Your Honor will recall——

The Court: (Interposing) Over what period?

Mr. Neblett: Over a period from '35 to '44. Your Honor will recall that the contract of April 23, 1935 contained a provision that Seattle Brewing and Malting Company would spend—keep up or spend certain amounts advertising the name Rainier.

Now, we want to show this advertising and the amounts spent on down to 1944 for the purpose of showing that Seattle Brewing and Malting Com-

pany is still performing under the contract of April 23, 1935, that that was an important part, and essential part of that contract.

The Court: A continuing obligation?

Mr. Neblett: And a continuing obligation. That is exactly the point.

The Court: Any objection?

Mr. Mackay: Well, if your Honor please——

Mr. Neblett: (Interposing) I think Mr. Mackay has a copy.

Mr. Mackay: I think whether the obligation is a [595] continuing one must be determined by the contract itself.

Mr. Neblett: That is right.

Mr. Mackay: And that an exhibit in the other case, even if it is advertising that they spent, won't help determine the question here. It is a legal question that counsel is trying to prove.

I object to the exhibit as being incompetent, irrelevant and immaterial. It takes into consideration matters not at all material to this case, particularly it goes into '43 and '42, years subsequent to the date here. We are not concerned with it at all. It could have absolutely no bearing on the contract. If you look at the contract your Honor can well see during the royalty time of the contract they weren't paying to advertise it.

The Court: Then, if the whole matter is dependent on the contract the schedule which is offered would be immaterial, wouldn't it?

Mr. Mackay: Yes, your Honor, quite.

The Court: Well, then, subject to the point that the contract is determinative of the question I will receive the schedule in evidence only to show that the Century Company expended some amounts for advertising.

Mr. Mackay: All right.

Mr. Neblett: It would also show the amounts in advertising, that a good part of its value could have been developed [596] after '35. For example, in 1935 it showed——

The Court: Oh, we are not going to go into that.

Mr. Neblett: Very well, your Honor, on the first ground is satisfactory to the Government.

Mr. Mackay: If your Honor please, if you get it in the record for one purpose it is in there for all. If that is the purpose at all, that can't possibly have any value here with respect to the value of that, whether we are building it up in that time. It is like the witness here who went to Seattle to see our enemy——

The Court (Interposing): The point is that the contract was made in 1935 and that the consideration was fixed in 1935.

How would they fix a consideration in 1935 in anticipation of the increment that would result in succeeding years for expending some money for advertising?

Mr. Neblett: I think your Honor's point is well taken, but I just want to show the amounts they spent, that is all.

The Court: The objection is sustained.

Mr. Neblett: Very well.

Mr. Mackay: Are you through?

Mr. Neblett: Yes, your Honor.

Mr. Mackay: If your Honor please, counsel quoted from an unsigned memorandum which is on the stationery of [597] John F. Forbes and Company, and dated October 15, 1942.

I have examined the statement, and I found out that counsel has read into the record only the parts that seem favorable, I mean favorable to the Commissioner, and I am not accusing him of anything, but I would like very much to offer the whole thing.

The Court: You want to offer the whole thing. The whole report is received now as Petitioner's Exhibit next in order which, I believe, is 41.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 41.)

[Petitioner's Exhibit No. 41 appears in Book of Exhibits.]

Mr. Neblett: I felt fairly certain, your Honor, that Mr. Mackay would read the balance of the document.

The Court: Oh, I would rather have the whole statement in the record and not excerpts from it, for myself.

Mr. Neblett: Yes.

Mr. Mackay: Now, if your Honor please, I think that counsel in his examination of Mr. Weber had referred to the Anti-Saloon League Book for the year 1914.

I should like to offer in evidence pages 84 and 85

which show the consumption of malt liquors and also the per capita consumption in the United States from 1840 to 1912.?

The Court: Why?

Mr. Mackay: Well, it shows——

The Court (Interposing): The whole United [598] States?

Mr. Mackay: Well, my purpose in offering that, your Honor, is that it shows the gradual climb from 1905 on.

The Court: Oh, I should think that would be immaterial.

Mr. Neblett: We think it is immaterial, your Honor, too remote and speculative.

The Court: In the whole United States?

Mr. Mackay: Well, I will confine it, if your Honor please. I have one here from the Department of Commerce, just from the State of Washington.

Mr. Neblett: Let me see that.

The Court: That is increase in per capita consumption in the State of Washington, is that right?

Mr. Mackay: No; that is just—wait a minute! (Examining document.) No, this is merely fermented liquors produced in the State of Washington.

The Court: Fermented liquors produced in the State of Washington?

Mr. Mackay: This is called "Fermented Liquors."

Well, never mind, your Honor. Withdraw it. We have more.

The Court: Is beer fermented liquor?

Off the record.

(Remarks off the record.) [599]

The Court: Is there anything further?

Mr. Mackay: No, your Honor.

The Court: Now, just before we go to the question of briefs I am going to have to ask you something about the contract, Exhibit 1.

Mr. Mackay, Rainier agreed to sell to Century all of the property described below, a tract of land known as the Julius Horton tract—", et cetera, et cetera, et cetera, "together with appurtenances thereunto belonging or appertaining," and "2500 half barrel beer containers," and a little bit of personal property consisting of some cardboard cases and some beer on hand, and some sales material, and some office fixtures and equipment.

Now, what did Rainier sell to Century? In the niceties of legal language sometimes really nothing can be ascertained.

Of course, I am aware of the fact that improvements become fixtures, and if you sell property no doubt you sell the fixtures attached thereto.

From this contract I really don't know what Rainier sold to Century under the first part of this agreement,—it is called a Purchase Agreement—the first part of this contract. What did Rainier sell to Century? What is supposed to be meant by that description? Did Rainier just sell to Century a piece of land? I don't think so. [600]

Mr. Mackay: No, your Honor.

The Court: If not, what did they sell to Century?

Mr. Mackay: It is my understanding Rainier at that time agreed to sell Century their brewery plant at Georgetown, Washington.

The Court: Well, now, is that anywhere stipulated by the parties? Do you have any stipulation like this, that under a contract dated April 23, 1935, petitioner, Rainier Brewing Company, sold to Century a beer brewing plant known as the Georgetown plant located in such and such a place?

Mr. Mackay: Well, if your Honor please, I think in the ninth paragraph of the pleadings it says: "Pursuant to the terms of said contract Rainier sold to Century its brewery located at Seattle, Washington, together with the beer on hand, and personal property situated in said brewery, and Rainier withdrew from the sale and distribution of its products in the State of Washington and Territory of Alaska."

That is Paragraph (i), your Honor.

The Court: And evidently a good part of your pleadings are admitted, is that correct?

Mr. Mackay: I want to say this: In the 25 years I have been practicing there has been more admissions in this case by the Commission than in any other case.

The Court: Yes. All right.

Now, Paragraph (i), then, is supposed to be your [601] description of what was sold under the first paragraph of this contract, which is Exhibit 1, is that correct?

Mr. Mackay: That is right, your Honor. That is admitted.

The Court: And was the brewery plant of Rainier located at Seattle?

Mr. Mackay: Mr. Goldie?

Mr. Goldie: No.

The Court: The only brewery plant of Rainier——

Mr. Goldie (Interposing): Georgetown.

The Court: What?

Mr. Goldie: Georgetown.

Mr. Mackay: It is Georgetown, Washington.

The Court: Well, this says "located at Seattle."

Mr. Goldie: Well, it is partly Seattle, but it is about 8 miles out of the City.

The Court: Well, then, the plant was located at Georgetown, Washington?

Mr. Goldie: Yes, part of Seattle.

The Court: Georgetown, Washington, which is about how many miles from——

Mr. Goldie: About 8 miles south of Seattle.

The Court: From Seattle. And how big a plant is that?

Have you been sworn in? [602]

Mr. Goldie: Yes.

The Court: Who is speaking, please?

Mr. Mackay: Mr. Goldie.

The Court: Mr. Goldie, how big was that plant?

Mr. Goldie: We had a frontage on the street there of 1400 feet.

The Court: Was that your——

Mr. Goldie (Interposing): Four blocks, practically.

The Court: Was that your main plant in the State of Washington?

Mr. Goldie: Yes, ma'am.

The Court: Did you have any other plants?

Mr. Goldie: Yes; years ago we had other plants.

The Court: No, at the time this contract was made?

Mr. Goldie: That is the only plant we had.

The Court: Is that the plant that was producing three hundred some odd thousand barrels of beer a year in 1935?

Mr. Goldie: Yes, your Honor.

The Court: Was that plant in existence on March 1, 1913?

Mr. Goldie: Yes, your Honor.

The Court: In exactly the same condition?

Mr. Goldie: Yes, your Honor. [603]

The Court: Is that true?

Mr. Goldie: Absolutely.

The Court: There have been no improvements in that plant?

Mr. Goldie: We kept improving every year, building on to it.

The Court: Your additions and improvements?

Mr. Goldie: As the business grew we kept building on to take care of all the additional business.

The Court: All right. Did that plant have the same productive capacity on March 1, 1913, that it had on April 23, 1935?

Mr. Goldie: Well, that was entirely a different plant. We were manufacturing in '35 down here.

The Court: Just answer my question.

Mr. Goldie: I couldn't answer that because this was entirely a new plant that we built in 1915. You see, there were two separate plants.

The Court: Well, no. We are not tracking together on this at all. You had a plant in Georgetown that you sold in 1935?

Mr. Goldie: That is right.

The Court: Now, just follow me carefully, please.

I asked you a few minutes ago if that plant was [604] there on March 1, 1913?

Mr. Goldie: Yes, your Honor.

The Court: It was?

Mr. Goldie: Yes, your Honor.

The Court: And I asked you if the productive capacity of the plant in 1913 was the same as it was in 1935?

Mr. Goldie: Well, that is hard to answer that question, your Honor, for the reason—if you will permit me to explain it?

The Court: Well, now, you don't know why I am asking this question so I have to ask you to just answer my question.

Mr. Goldie: Well, I can't very well for this reason: In 1915 when the State of Washington went dry that place closed up. We came down here and built a new plant.

The Court: All right, now, I am going to stick

at this. I am not talking about 1915 when your plant closed.

Mr. Goldie: Well, you are speaking of '13.

The Court: I am talking about 1913, which is this date we have to make a valuation on, and your plant was then in operation.

Mr. Goldie: That is right.

The Court: Were you acquainted with the plant then?

Mr. Goldie: I was. [605]

The Court: All right. Now please stick to my question.

Mr. Goldie: All right.

The Court: I don't care what happened in between——

Mr. Goldie (Interposing): I see.

The Court: So far as your description is concerned. You know what happened in between, but I am not going to ask you to go into an explanation. I am just going to ask you to give me a statement of fact.

Was the productive capacity of the Georgetown plant on March 1, 1913, exactly as it was on the 23rd day of April, 1935?

Mr. Goldie: I would say it was larger.

The Court: In 1935?

Mr. Goldie: In 1913.

The Court: You would say it was larger in 1913?

Mr. Goldie: Yes, ma'am, it was larger in 1913 than this new plant was in 1935.

The Court: You had a new plant there in 1935?

Mr. Goldie: In San Francisco.

The Court: In San Francisco?

Mr. Goldie: Yes, ma'am. We put that in in 1915.

The Court: Well, what plant did you sell to the Century Company in 1935?

Mr. Goldie: That plant up in Seattle. [606]

The Court: You didn't sell any plant in San Francisco, did you?

Mr. Goldie: No, ma'am, we still operated that plant in San Francisco.

The Court: Well, I didn't ask you anything about the productive capacity of the plant in San Francisco.

Why do you bring in San Francisco?

Mr. Goldie: Well, I thought that is what you asked me.

The Court: I asked you nothing of the kind. Please pay attention to my question.

Mr. Goldie: I will try to.

The Court: We will start in all over again.

You sold a plant on April 23, 1935, as I understand it, under this contract that is Exhibit 1.

Mr. Goldie: That is right.

The Court: And that plant was located in Georgetown? Mr. Goldie: That is right.

The Court: Now, I will have to begin all over again.

When did you build that plant?

Mr. Goldie: Well, they started to build that. I was not connected with the company, but I presume

somewhere around 1900, or probably before that. I couldn't answer that. [607] I remember this very well, though, when I first arrived in Seattle in 1900 the plant was pretty well up, not quite as big as it was at the end of 1913, but there was quite a large brewery there.

The Court: So that plant that you sold in 1935 was first constructed in 1900?

Mr. Goldie: Oh, around about that time.

The Court: And was on the site in 1913?

Mr. Goldie: Yes, ma'am; yes, ma'am!

The Court: And what was the productive capacity of that plant in 1913, leaving out of consideration, please, the productive capacity of any other plant owned by Rainier, and leaving out of consideration any shipments of beer into the State of Washington from any plant outside of the State of Washington?

What was the productive capacity of the plant in Washington just taken alone?

Mr. Goldie: I would say between three and four hundred thousand barrels per annum.

The Court: Between three and four hundred thousand barrels.

Now, was that the productive capacity of the plant in 1935?

Mr. Goldie: It could have been.

The Court: Was it? Was the productive capacity [608] of the plant in 1935 greater than 400,000 barrels?

Mr. Goldie: It was not operating at that time.

The Court: It was not operating in 1935?

Mr. Goldie: No, ma'am.

The Court: When was it closed down?

Mr. Goldie: It closed down on January 1, 1916.

The Court: Well, I didn't know that. The Washington plant had never been in operation?

Mr. Goldie: No, ma'am. No, ma'am. I might also explain, you asked counsel a minute ago about the sales made on those 2000 kegs and the beer on hand.

The Court: No, please don't go into anything else.

Mr. Goldie: Oh, all right!

The Court: Because you don't know what I have in mind, and I am trying to get something straightened out in my mind, and then you just confuse me and confuse the record.

Well, I didn't know that. Isn't this the first time that it has come out in this record that that plant at Georgeown had been an idle plant from 1915 when it was closed down, until 1935 when it was sold?

Mr. Mackay: I think that Mr. Neblett mentioned that in his opening statement. My understanding of the plant, after it was closed down, it wasn't making any beer, it was nevertheless used as a warehouse and storage plant for beer. [609]

The Court: Well, that is all right. That is beside the point. It was not being used to manufacture beer, is that correct?

Mr. Mackay: After 1916, is right.

The Court: After 1916?

Mr. Mackay: That is right, your Honor.

The Court: That is what the witness has been trying to tell me, then, that the plant was closed in 1916.

Mr. Goldie: That is right.

The Court: And thereafter all the beer that the Rainier Brewing Company sold in the State of Washington was beer that was manufactured in San Francisco?

Mr. Goldie: That is correct.

The Court: And shipped into the State of Washington, is that correct?

Mr. Goldie: That is correct.

Mr. Mackay: That is correct.

The Court: Well, that is the first time I knew that.

Now, I want to go to some other points in the contract.

Is the Century Brewery Company now operating that plant in Georgetown? Maybe Mr. Goldie ought to take the stand.

Mr. Mackay: He testified to that this morning, [610] your Honor.

Mr. Golden: They did not.

Mr. Mackay: They have never operated since.

Mr. Goldie: That was another brewery that Century was operating.

The Court: Why did they buy that plant?

Mr. Goldie: They bought it—that was part of the deal we made with them. It was rented partly to an ice manufacturing company during that period after prohibition.

The Court: An ice manufacturing——

Mr. Goldie (Interposing): To an ice manufacturing company, and we practically insisted that they buy that property from us and that is what——

The Court (Interposing): Would you mind taking the stand again, please?

Mr. Goldie: Yes.

JOSEPH GOLDIE,

recalled as a witness by and on behalf of the petitioner, having been previously duly sworn, was examined and testified further as follows:

The Court: When prohibition then came along in the State of Washington in 1914—isn't that the time?

The Witness: No. They voted it in '14, but the state closed in November. The election took place in November, 1914, and they gave them a year, a little over a year, to stay [611] in business, and then closed up on January 1, 1916.

The Court: When you closed on January 1, 1916, that was because of the enactment of the National Prohibition Law?

The Witness: That is right.

The Court: And did you then dismantle that plant?

The Witness: Yes, ma'am. We took out some of the equipment and moved it down to our new plant there.

The Court: I suppose that in the course of time

(Testimony of Joseph Goldie.)

you took out all of the equipment that you would use in beer manufacturing?

The Witness: Well, we took as much as we could use. We left all our refrigeration there, our ice machines and things of that kind.

The Court: Well, I mean whatever you use in the brewing of beer you brought down here?

The Witness: Some equipment that we could use, yes, ma'am.

The Court: That left the plant up there equipped only for refrigerating and storing purposes?

The Witness: That is correct.

The Court: Did you use it as a storehouse for beer?

The Witness: Yes, ma'am, we opened up—we had to have a place to do business in, so we used it for our [612] storage beer that we shipped into the State of Washington. We had our sales office there and kept our trucks there.

The Court: Now, let me ask you this: Were you a party to this contract?

The Witness: How?

The Court: Were you a party to this contract?

The Witness: Yes, ma'am.

The Court: Well, you weren't one of the signers? Mr. Hemrich signed it, and Mr. Specht.

The Witness: He was president at that time, that is right.

The Court: Mr. Specht isn't here, is he?

The Witness: No, he is not with us any more.

The Court: The intention of Rainier under this

(Testimony of Joseph Goldie.)

agreement, as I understand it, was to end the sale of its own beer in the State of Washington?

The Witness: And Alaska.

The Court: And Alaska.

The Witness: That is right.

The Court: Well, now, if it were going to end the sale of its own beer in Washington and Alaska it wouldn't have any need any longer for that refrigeration and storage space at Georgetown, would it?

The Witness: No, ma'am.

The Court: And is that the reason it wanted to [613] sell that Georgetown plant?

The Witness: Well, we had no intention of selling it until we were approached by the Century Brewing Company.

The Court: Will you just try and answer the questions I ask you?

Read the question, please.

(The question referred to was read by the reporter.)

The Court: In 1935 when you had decided to sell it, was that the reason you wanted to sell it?

The Witness: No, we did not decide to sell it. We had intended to go up there and open that brewery up. We were doing such an enormous business there that we wanted to rehabilitate the brewery. Then we were approached by these people to take over the sale of our beer on a royalty basis and then purchase at the end of five years.

(Testimony of Joseph Goldie.)

The Court: So that when you decided to let them take over the sale of your beer on a royalty basis, then you didn't want the refrigerating plant any more, did you?

The Witness: No, ma'am.

The Court: All right, have it your own way.

The art is to find out how to ask the question the way the witness wants you to ask the question.

Now, of course, that explanation of the first part of this contract is very helpful in understanding the [614] contract. I think that I will want to know, when I take this case up, what it was that Rainier Brewing Company sold under this contract, don't you see?

Mr. Mackay: Yes.

The Court: And, of course, I want to know what the heart of this contract is.

Mr. Mackay: That is right.

The Court: Now, obviously, the main thing sold under this contract was not the plant.

Mr. Mackay: No, that is correct.

The Court: Is there any question existing there between the parties as to what Rainier sold to Century under the part of this contract that is given the heading of "Licensing Agreement?"

I might say that I am asking these questions because we assume that an issue has been raised under the pleadings, and yet from the testimony that has been offered the court is asked to decide a very difficult question, and this court is inclined to be lazy.

Mr. Mackay: We don't believe it.

(Testimony of Joseph Goldie.)

The Court: I don't want to have to decide any question that I really don't have to decide. Furthermore, there is another case before the Tax Court that was heard before Judge Mellot, and, I think, if possible, that I want to be very sure about what the issue in this case is. [615]

Mr. Mackay: Yes.

The Court: Also, I am very realistic, as I think you know, and I think that these valuation questions are terriffically difficult because they involve so many assumptions, hypotheses, and unrealistic factors. And I think the right answer to the problem is going to be found by taking the most realistic approach. So I would start out by wanting to be very sure about what was sold under this contract, or licensed, or transferred, or bargained for, whatever we are going to call it.

There is a difference of opinion, evidently, between the parties to the contract, as to what the terms of this contract mean, is that true?

Mr. Mackay: Well, there has never been any difference, I think, between the parties.

The Court: Well, hasn't the other party to this contract reported income on a basis that would result from a different understanding of the terms of this contract?

Mr. Mackay: That is what I was going to say, the difference lies between the two contracting parties of the United States Government as to the interpretation, but as to the——

The Court (Interposing): No. Have you re-

(Testimony of Joseph Goldie.)

ported your income in a way that is consistent with the other party in the contract? [616]

Mr. Mackay: Yes, your Honor. We reported this as a sale. We claimed value equal to and in excess of the sales price, therefore, no gain.

The Court: How do the other parties treat this transaction?

Mr. Mackay: Well, I understand that——

The Court (Interposing): On its return? Did they treat this as a purchase of a trade name?

Mr. Mackay: Well, in their income tax return, which I haven't seen—I will just state it from hearsay—on reading the transcript it seemed to me they deducted the royalties up to—was it June, 1940?

Mr. Neblett: That is right.

Mr. Mackay: And claimed no more. And then they had a tax case in the Tax Court, and then in the Tax Court they claimed the right to deduct the greater amount, claiming then it was a royalty.

I think I am stating that correctly.

The Court: If they claimed their payments were royalties that would—if I understand it correctly, that would suggest to me that they interpreted this provision in the contract as meaning that they were purchasing a right, assuming an obligation to pay royalties, and that they were not purchasing a capital asset.

Mr. Mackay: As I said, at the time they filed [617] the return I think they just viewed it as a payment of the royalty, because there was six months royalty due, and then after they exercised

the option of course there were no further payments. Then I understand that after the Government had proposed additional taxes as an offset, they then claimed they were entitled to additional royalties. [618]

Mr. Neblett: The claimed a deduction for the million dollars in the Seattle case——

The Court (Interposing): On what theory?

Mr. Neblett: On the theory that this contract is a license, that they didn't purchase the right at all.

The Court: Then the parties are not in agreement so far as the tax purposes are concerned? The parties are not in agreement in their interpretation of this contract?

Mr. Mackay: You are quite right so far as taxes are concerned. That is what I say.

The Court: That is as good a reason for having to construe a contract as any.

Mr. Mackay: That is right.

The Court: For taxes you can construe a contract for purposes of breach of contract, and it is just as much of a problem to construe a contract for purposes of taxes as it is to construe a contract for purposes of breach of contract. So I would say that in this case the most important thing was to determine what this contract provided.

Mr. Mackay: That is right.

The Court: And at the end of three days of trial that has not been established, has it, or am I——

Mr. Mackay (Interposing): I would think it has.

The Court: Or am I failing to understand the problem? [619]

I point this out because of the difficulties we have been through for three days. I am not always wholeheartedly in sympathy with the work I have to do as a Judge of this Court, or the work, the technique the tax lawyers employ. This subject is a terribly difficult subject for taxpayers, for tax practitioners.

Mr. Mackay: It is.

The Court: And there ought to be better techniques employed. We shouldn't have had to spend three days going through the kind of speculative opinion, testimony, that we have gone through that has no exact technique involved. If the health and welfare of the world depended upon that kind of technique we would fail to survive.

Mr. Mackay: You are quite right.

The Court: We couldn't win a war if we were applying that kind of technique to practical problems, and this is a practical problem, and we don't have a good technique for solving it.

That is true? Isn't that true, I mean as individuals?

Mr. Mackay: There is much in what you say.

The Court: As individuals we would admit that. We might not want to admit that as counsel for the parties in the case, but I am in a position to take an objective view and that is my opinion of it.

Mr. Mackay: I am glad to get it. [620]

The Court: Now, we can't go on any longer. I wanted to tell you that I consider the most impor-

tant thing in approaching this problem a clear understanding of what the parties disposed of.

Mr. Mackay: That is quite right, your Honor.

The Court: Under this contract, and what kind of disposition was made.

Mr. Mackay: Yes.

The Court: And counsel for both parties submit that to the Court, I understand? The Court is to apply its best judgment as to whether there was a mere licensing agreement here, or a sale of the right to use a trade name, or a sale of the trade name itself. And assuming that the Court decides that there was the sale of a trade name, then the Court must determine whether the taxpayer realized any gain when payments were made in the taxable year. And, as I understand it, both parties take the view that from 1935 until 1940 the payments made were royalty payments?

Mr. Mackay: Yes.

The Court: But that in 1940 the time came to exercise what has been referred to as an option?

Mr. Mackay: Yes.

The Court: And that at that time one party says the option was to anticipate royalty payments; is that right?

Mr. Mackay: That is right. [621]

The Court: Is that your position?

Mr. Neblett: That is right.

The Court: Now, what do you think they did when they exercised this option?

Mr. Neblett: Well, we have taken two positions in it. We say in the Seattle case, your Honor, that

they purchased the trade name, and it was a capital transaction. That was the position we took before Judge Mellot.

The Court: And that they paid a consideration of $1,000,000 for the purchase of a trade name?

Mr. Neblett: And the other rights in that contract of April 23, 1935.

The Court: Well, there is where you get off the beam when you say "and those other rights."

Mr. Neblett: Yes.

The Court: Well, now, what position do you take in this case?

Mr. Neblett: We take the position in this case that in view of the rights that were reserved that this did not constitute a sale or a capital transaction, it constituted a mere license. In other words, we take an opposite position from what we took in the Seattle case.

The Court: Now, of course, the petitioner has understood that that is the attitude of the government?

Mr. Mackay: Yes, your Honor. [622]

The Court: And everyone is being patient about that. We are being good-natured in what we think may be an inconsistent position and that is fine. It is a good thing that citizens can have that patience. The thing that troubles me, though, is that you come before this division of the Tax Court, the petitioner knowing, Mr. Mackay, that the government is taking an inconsistent position, and knowing that we have a rule, a perfectly good rule in the Law of Contracts and in the law of construing contracts,

that we may look to the intent of the parties, petitioner does nothing to help the Court to answer this first primary problem.

Mr. Mackay: I might say, your Honor——

The Court (interposing): Other than to say "We think that the contract speaks for itself, and that within the four corners of the contract the terms make it perfectly clear that this was the sale of a trade name ,and that that was the main thing and the only thing covered by the contract, that the $1,000,000 was paid just for the sale of the trade name. Therefore, we think the issue now resolves itself under the terms of this contract." And we go forward for three days to introduce some testimony of eminent experts on the subject of valuation to show what the fair market value of this trade name was on March 1, 1913, assuming the hypothetical and unreal situation that there was a willing buyer and a willing seller who wanted to buy just the trade name [623] and nothing else.

Well, I just want to be sure that I am describing the situation to myself properly.

Mr. Mackay: Well, it is very helpful, your Honor. We are glad to get it.

The Court: Am I describing the situation to myself properly?

Mr. Mackay: Why, I think so, yes.

The Court: Am I doing my thinking out loud right?

Mr. Mackay: Well, I am glad to those outward thoughts, because, after all, it will help us to concentrate in the brief.

The Court: Well, it may help you to concentrate on a brief, but what I am trying to decide in the next five minutes is whether I will conclude the hearing in this case or whether I will continue it until Monday.

Mr. Neblett: Your Honor, could I say this in a brief statement——

The Court (interposing): Well, I would like to finish my thought because I have taken some time to voluntarily express it.

Mr. Neblett: Very well, your Honor, certainly.

The Court: What witnesses could you call, Mr. Mackay, to testify about this contract?

Mr. Mackay: To tell you frankly, Judge, we have [624] exhausted every possible means to find anything on it.

The Court: Well, you have the parties to the contract. Now, if I were to subpoena on the order of the Court the parties to this contract and ask them to testify about this contract, I think I would be exercising my duties as a judge very properly because I can't reach the question about which these three days of testimony has been given without first deciding whether there was a licensing agreement or whether there was a sale. And I doubt whether that is such a pure question of law that you can help me to answer that question merely by citing cases, certainly not just by citing tax cases, because every tax case in general stands upon its own facts. And when there is any dispute between the parties, of all things between the parties, a dispute as to the meaning of a contract, then it

would follow that the terms of the contract were ambiguous and that we had to go outside the four corners of this contract to properly construe the contract, and that is exactly the position that we are in because two taxpayers have taken a different position in reporting their income, and because the government is taking an inconsistent position.

Now, please don't misunderstand what I am saying. I am not trying to make this case any more difficult for myself, or for the reporter who is taking the transcript, but I would like to have your advice about whether some testimony [625] should be offered by the petitioner of the intent of the parties to this contract.

Off the record.

(Discussion off the record.)

The Court: On the record.

I would just like to say this: I have made my comment about the problem which, I think, is very important in this case, and I am going to take a recess, during which time we will also give some attention to the time for the filing of briefs. What I have said is by way of suggestion, and if any further time is required, is requested for the trial of this case I will grant that additional time. If no time for the further trial is requested, then I consider the parties now rest their case.

I would like to say that I think that counsel for both the petitioner and the respondent have done an extraordinarily fine bit of work in their presentation of this case, and that the harmony that has been shown, the patience, and the general good

feeling of counsel and also their clients is something that prompts me to say that I have enjoyed hearing this case.

Mr. Mackay: Thank you, your Honor.

The Court: But I am sorry that it is such a difficult case, and that I hope both taxpayers and the government are going to be well pleased with the results. [626]

Mr. Mackay: Thank you, your Honor. You have been very patient.

Mr. Neblett: Thank you.

The Court: Think about the time for the briefs.

Mr. Mackay: Yes, your Honor.

(Short recess.)

The Court: Mr. Mackay?

Mr. Mackay: If your Honor please, we have thought that over, and we feel that we have put in all the evidence that is available to us, and we are willing to stand on the record.

The Court: Very well.

Now, about the briefs, I am quite sure that with this very long record 45 days is not going to be enough time.

Mr. Mackay: No.

The Court: Mr. Neblett, I believe you argued the case in Seattle, did you?

Mr. Neblett: I tried the case up there.

The Court: Do either of you want to suggest alternate briefs?

Mr. Neeblett: I would like to suggest that.

The Court: You would?

Mr. Neblett: Yes, for two reasons, your Honor. I have to go back to Washington, D. C. right away, and, secondly, that will give me a chance to get back here, and if Mr. Mackay [627] writes his brief first it will give me something specific to attack, and we can meet the issue head on. I think that would be a very good way to treat this case.

The Court: If I allowed twenty days for the record to come in, and then 45 days for the first brief, will that be enough?

Mr. Mackay: That will be sufficient, I think, your Honor.

The Court: That will be 65 days from today.

Mr. Mackay: Yes.

The Court: When would the first brief be due?

The Clerk: September 24th.

The Court: Then if I allow 30 days after that——

Mr. Neblett (interposing): How many days?

The Court: Thirty. First brief due Seeptember 24th.

If your brief were due October 24th would that be enough time for you?

Mr. Neblett: If your Honor please, I would rather have more than 35 days; 45 days. It would just be 15 days extra, and I think it would be ample.

The Court: All right, 45 days from September——

The Clerk (interposing): November 8th.

The Court: November 8th, and then 30 days for a reply.

Mr. Mackay: I think we can get it within 30 days, [628] your Honor.

The Clerk: That is December 8th.

The Court: Make it December 10th.

Petitioner's reply brief Deecember 10th.

Mr. Neblett: That is splendid, your Honor.

The Court: Now, I would like to complete my work on this case so that the Court will have the results of both Judge Mellot's efforts and my efforts before it at the same time, but that case in Seattle was tried during the Spring, and so with this long time for the briefs Judge Mellot may feel that he wants to go right ahead and have his case considered just in order.

If there seems to be any advantage, I meean an objective way, the right way for these cases to be considered at about the same time by the Court, it might be necessary to file a motion. I don't know. On the other hand, if you feel that you would just like to let the chips fall where they may and have these cases just taken up in order as they are usually, why, we will let it go that way. I have a good many pending cases. I had practically a three weeks calendar in Detroit toward the end of May, and that would indicate that I wouldn't really complete my work on this case until the early part of next year.

So I am again thinking out loud, and I will say nothing further and just let you have the benefit of my [629] very candid expressions. I know that you understand that what I say I am saying because I have everyone's best interest at heart.

Mr. Mackay: Oh, yes, I am sure of that.

The Court: All right. If there is nothing further then, this concludes the hearing at this proceeding, and again I would like to thank you very much for a very interesting trial, the most interesting case I have heard for a good many years.

Mr. Mackay: Well, thank you, your Honor. We appreciate your patience.

Mr. Neblett: Thank you.

(Whereupon, at 6:45 p. m. the hearing was closed.)

Filed Aug. 13, 1945. [630]

In the United States Circuit Court of Appeals for the Ninth Circuit

T.C. Docket No. 4895

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

RAINIER BREWING COMPANY,
Respondent on Review.

STATEMENT OF POINTS

Come Now the Commissioner of Internal Revenue, the petitioner on review herein, by his attorneys, Sewall Key, Acting Assistant Attorney Gen-

eral, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and makes this concise statement of points on which he intends to rely on the review herein, to-wit:

1. The Tax Court of the United States erred in ordering and deciding that there is a deficiency in income tax for the year 1940 in the amount of only $149,548.89 and that there are no deficiencies in declared value excess profits tax and excess profits tax for the year 1940, and that for the year 1941 there is a deficiency in excess profits tax in the amount of only $15,338.15.

2. The Tax Court of the United States erred in holding and deciding that the amount received by the taxpayer in 1940, in the form of notes, for the right to use its trade names in a limited territory was not ordinary income, but constituted proceeds from the sale of a capital asset.

3. The Tax Court of the United States erred in failing and refusing to hold and decide that, as was determined by the Commissioner, the $1,000,000 in notes received by the taxpayer in 1940 pursuant to the exercise by the Seattle Brewing & Malting Company of the option granted under the contract of 1935 constituted ordinary income.

4. The Tax Court of the United States erred in holding and deciding that in computing taxpayer's adjusted basis for its good will the March 1, [1278] 1913, value of the taxpayer's trade names can only be reduced by such amount as taxpayer's predecessors received tax benefits therefrom, to-

wit, the amount of $138,137.40, and not by the loss, to-wit, $406,680.20, allowed by the Commissioner to the taxpayer's predecessor on account of the obsolescence in value of good will occasioned by the National Prohibition Amendment.

5. The Tax Court of the United States erred in holding and deciding that no part of the $1,000,000 received by the taxpayer for the right to use its trade names in the State of Washington and the Territory of Alaska was received in payment for its agreement not to compete with the Seattle Brewing & Malting Company in that territory and "that any value which the agreement not to compete had in 1935 had been exhausted when, in 1940, Century elected to exercise the option and purchase the exclusive and perpetual right to use the trade names in its business."

6. The Tax Court of the United States erred in that its opinion and decision are not supported by but are contrary to its findings of fact and the evidence.

7. The Tax Court of the United States erred in that its opinion and decision are contrary to law.

/s/ SEWALL KEY, CAR
Acting Assistant
Attorney General,
J. P. WENCHEL, CAR
Chief Counsel, Bureau of
Internal Revenue,,
Attorneys for Petitioner
on Review.

Statement of Service

A copy of this Statement of Points was mailed to A. Calder Mackay, Esq., 728 Pacific Mutual Bldg., Los Angeles 14, California, attorney for respondent on review, on January 21, 1947.

/s/ CHAS. E. LOWERY,

Special Attorney,
Bureau of Internal Revenue.

Received and filed Jan. 21, 1947. [1279]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes Now the Commissioner of Internal Revenue, the petitioner on review herein, by his attorneys, Sewall Key, Acting Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and complying with the rules of this court, pertaining to the designation of the portions of the record to be printed, states that he relies upon the entire record certified by the Clerk of The Tax Court of the United States, and directs

that said record so certified be printed as the record on review.

/s/ SEWALL KEY, CAR
Acting Assistant
Attorney General,
/s/ J. P. WENCHEL, CAR
Chief Counsel, Bureau of
Internal Rvenue,
Attorneys for Petitioner
on Review.

Statement of Service

A copy of this Designation of Portions of Record to Be Printed was mailed to A. Calder Mackay, Esq., 728 Mutual Bldg., Los Angeles 14, California, attorney for respondent on review, on January 21, 1947.

/s/ CHAS. E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

Received and filed Jan. 21, 1947. [1280]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

Comes Now the Commissioner of Internal Revenue, the petitioner on review herein, by his attor-

neys, Sewall Key, Acting Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for the purpose of the review which he, the said petitioner on review, has heretofore taken to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designates for inclusion in the record on review the following:

1. Docket entries of the proceedings before the Tax Court.

2. Pleadings:
   (a) Petition, including annexed copy of deficiency notice,
   (b) Answer,
   (c) Amendment to petition,
   (d) Answer to amendment to petition.

3. Findings of fact and opinion promulgated June 18, 1946.

4. Decision entered August 12, 1946.

5. Petition for review and notices of filing petition for review.

6. Stipulations of fact.

7. Official report of hearing before Tax Court on July 19, 20, and 21, 1945.

8. All Exhibits. [1281]

9. Order extending time for transmission of record.

10. Statement of Points.

11. Designation of Portion of Record to Be Printed.

12. This Designation.

Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

/s/ SEWALL KEY, CAR
Acting Assistant Attorney,

/s/ J. P. WENCHEL, CAR
Chief Counsel, Bureau of
Internal Rvenue,
Attorneys for Petitioner
on Review.

Statement of Service

A copy of this Designation of Contents of Record on Review was mailed to A. Calder Mackay, Esq., 728 Mutual Bldg., Los Angeles 14, California, attorney for respondent on review, on January 21, 1947.

/s/ CHAS. E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

Received and filed Jan. 21, 1947. [1282]

The Tax Court of the United States
Washington

Docket No. 4895

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

RAINIER BREWING COMPANY,
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 1282, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 7th day of February, 1947.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 11547. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Rainier Brewing Company, a corporation, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed February 15, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.